(1) Supreme Court, U.S.
FILED

NO. 951007 DEC 22 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Randall M. Lutz
Counsel of Record
Patricia McHugh Lambert
Smith, Somerville & Case, L.L.C.
100 Light Street, Fifth Floor
Baltimore, Maryland 21202
(410) 727-1164

Nathan J. Greenbaum
Washington Suburban Sanitary Commission
14501 Sweitzer Lane
Laurel, Maryland 20707
(301) 206-8155
Attorneys for Petitioner

CASILLAS PRESS INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

106 pp

QUESTIONS PRESENTED

1. Does the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), contemplate only a single "release," which would trigger liability under CERCLA, or can "multiple releases" occur when the hazardous substance migrates from its original source, through adjoining properties, thereby imposing joint and several liability on each victimized adjoining property owner through whose property the hazardous substance passed?

2. Does the leaking of a hazardous substance by passive migration through the cracks and joints in a publicly-owned sewer system constitute a "release" from a "facility" rendering the sewer system liable under CERCLA, 42 U.S.C. § 9607(a), when the hazardous substance was originally released into the sewer system by an industrial user of the system?

PARTIES TO THE PROCEEDING

The petitioner is the Washington Suburban Sanitary Commission (''WSSC''), an agency of the State of Maryland. The respondents are Westfarm Associates Limited Partnership and International Fabricare Institute. WSSC has no knowledge of any parent company or subsidiary of the respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT SHOWING ORIGINAL FEDERAL JURISDICTION 5

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 17

APPENDIX 1a

APPENDIX A: September 27, 1995 Opinion of Fourth Circuit 1a

APPENDIX B: November 10, 1993 Memorandum and Order of District Court 42a

APPENDIX C: October 22, 1993 Order of District Court 50a

APPENDIX E: 1984 Needs Survey Report to Congress 79a

TABLE OF AUTHORITIES

Cases: Page

Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg. Ltd., No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992).....12, 13

Cadillac Fairview/California, Inc. v. Dow Chem. Co., 21 Env't. Rep. Cas. 1108 (BNA 1984), *rev'd on other grounds*, 840 F.2d 691 (9th Cir. 1988).....14

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989).....15, 16

Ecodyne Corp. v. Shah, 718 F. Supp. 1454 (N.D. Cal. 1989).....14

In re Diamond Reo Trucks, Inc., 115 B.R. 559, 564-65 (W.D. Mich. 1990).....14

Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992).....9

New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).....15, 16

Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992).....15

Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989).....14

Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991).....14

Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988).....15, 16

United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990).....14

Page

United States v. Mexico Feed and Seed Co., Inc., 980 F.2d 478 (8th Cir. 1992).....14

United States v. Petersen Sand and Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992).....14

Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D.Vt. 1989).....13, 16

Statutes and Regulations:

Md. Ann. Code art. 29, § 1-101 *et seq.* (1993 Repl. Vol.) 5
1918 Md. Laws Ch. 122 5
28 U.S.C. § 1254 (1).....2
28 U.S.C. § 1331.....5
28 U.S.C. § 1332.....5
42 U.S.C. § 6972.....5
42 U.S.C. § 9601(8) 4, 16
42 U.S.C. § 9601(9).....5
42 U.S.C. § 9601(14).....6
42 U.S.C. § 9601(22).....3, 16
42 U.S.C. § 9607(a).....2, 8, 12
42 U.S.C. § 9613.....5
42 U.S.C. § 9659.....5

Other Authorities:

Robert M. Frye, Note, *Municipal Sewer Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute*, 14 Stan. Envtl. L.J. 61 (Jan. 1995).....9, 11

Page

Peter R. Hinckley, Comment, *State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay For the Cleanup Of Hazardous Industrial and Commercial Sewer Discharges*, 22 B.C. Envtl. Aff. L. Rev. 89 (Fall 1994).....9

Sewer Authority Appeal Ruled Too Early in Dispute Involving Municipality Liability, Env't Rep. (BNA) No. 42 (Feb. 6, 1995).....11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No.

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Washington Suburban Sanitary Commission ("WSSC"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 66 F.3d 669 (4th Cir. 1995) and was entered on September 27, 1995. *See*, Appendix (App.) A at 1a. The District Court's memorandum opinion and order, which is at issue, is reported at 846 F. Supp. 422 (D. Md. 1993) and is dated July 16, 1993. *See*, App. D at 50a. After considering WSSC's timely motion for reconsideration, the District Court entered a subsequent order dated October 22, 1993, which denied the motion. That decision is unreported,

but is attached as Appendix C at 48a. On August 5, 1993, WSSC moved to reduce the amount of the jury's judgment on state law claims based on a Maryland statutory cap. The District Court's denial of this motion is reported at 846 F. Supp. 439 (D. Md. 1993) and is dated November 10, 1993. *See,* App. B at 42a.

JURISDICTION

The judgment of the Court of Appeals was entered by an order issued on September 27, 1995. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of "release," "environment," and "facility" as those terms are used in CERCLA.[1]

Section 9607(a) of CERCLA states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) Any person who by contract, agreement, or

[1]The statutory provisions cited are those that were in effect in 1993. Some modifications to the statutes were subsequently enacted. These amendments, however, are not relevant to the issues presented.

otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned and operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessel or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Section 9601(22) states:

The term ''release'' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or

> discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

"Environment," as used in § 9601(22), is defined by 42 U.S.C. § 9601(8) as:

> (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

A "facility" is defined as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, store, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

STATEMENT SHOWING ORIGINAL FEDERAL JURISDICTION

Federal jurisdiction in the first instance was based on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), and 42 U.S.C. §§ 9613, 9659, and 6972.

STATEMENT OF THE CASE

The Washington Suburban Sanitary Commission ("WSSC") is an agency of the State of Maryland. Md. Ann. Code art. 29, § 101 *et seq.* It was created in 1918 for the purpose of providing, *inter alia*, for the construction, maintenance, and operation of a water supply and sewer system in Montgomery and Prince George's Counties, Maryland. 1918 Md. Laws Ch. 122. WSSC's Tech Road sewer, which is at issue in this case, is part of a network of approximately 4,000 miles of sewer pipes owned and operated by WSSC. The portion of the Tech Road sewer at issue was built in 1968.

Westfarm Associates Limited Partnership ("Westfarm") is a developer of property in the District of Columbia metropolitan

area. Westfarm owned several parcels of property near WSSC's Tech Road sewer. Several of these parcels had been sold and developed when Westfarm attempted to sell another parcel, Parcel A. During the negotiations for the sale of Parcel A, an environmental survey was undertaken. The survey disclosed the presence of perchloroethylene ("PCE") in the groundwater of Parcel A. PCE is a "hazardous substance" as defined in the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601(14).

Westfarm investigated the source of the contamination and traced it to its neighbor, International Fabricare Institute ("IFI"), whose headquarters, teaching facility and research laboratory abutted Parcel A and was connected to the Tech Road sewer. IFI is and was a trade organization of drycleaners, which moved to the Tech Road facility in 1974, after a corporate merger with the National Institute of Drycleaning. After the move in 1974, IFI began conducting laboratory research with PCE at this location into the efficacy of various drycleaning techniques. In the course of this research, IFI laboratory technicians and scientists experimented with quantities of PCE in various applications. Some PCE was used in connection with drycleaning machines. IFI scientists also used pure PCE in the evaluation of drycleaning processes.

Westfarm correctly concluded that the PCE from IFI had caused the contamination of its various properties. (Contamination was initially found on Parcel A. Subsequent subsurface testing revealed a "plume" of contamination that reached additional Westfarm parcels.) Westfarm sued IFI in January 1992 and, during the course of discovery against IFI in 1992, prior to WSSC's involvement in the case, proved the existence of several waste streams of PCE from IFI onto Westfarm's property:

- PCE-containing wastes, such as "cooked filter muck" generated by the drycleaning apparatus, were disposed of in a dumpster on site.
- PCE-containing waste water was spilled inside IFI's building and leaked on a variety of occasions, causing PCE to migrate through cracks and bolt holes in the concrete floor.
- Pure PCE was poured down the laboratory drains by IFI scientists who used it in connection with certain tests they performed.
- PCE-containing "separator water," generated by IFI's drycleaning apparatus, was discharged directly into the sewer.

IFI repeatedly lied to WSSC about its practice of pouring PCE down the drain and into the sewer. When IFI's predecessor, the National Institute of Drycleaning ("NID"), constructed the building in 1969, it had no research laboratory. IFI created a research laboratory at that location in 1974. When WSSC inquired about the laboratory's use of chemicals, IFI lied about its practice of pouring pure PCE down the research laboratory drains. When WSSC repeated its inquiries in 1981, 1984, and 1992, IFI again lied, covering up its introduction of PCE into the sewer.

This petition concerns what happened to the PCE after it was released into the Tech Road sewer. Westfarm alleged that PCE migrated through cracks and loose joints in the sewer, and into the groundwater. Although WSSC presented contrary evidence regarding this migration theory, WSSC's evidence was rejected by the District Court as well as by the Court of Appeals. Accordingly, for purposes of this petition, this Court should accept that PCE migrated out of the sewer pipes.

In order for liability to be imposed on WSSC, Westfarm was required to show, *inter alia*, that there had been a "release" or "threatened release" of a hazardous substance from a "facility." 42 U.S.C. § 9607(a). WSSC has contended and continues to contend that the facts of the instant case establish only one release — namely, a release which occurred when IFI disposed of PCE at its property site into its sewer lateral which was connected downstream to the Tech Road sewer. Westfarm agreed that a release occurred at the IFI site, but has argued that a second release occurred when PCE migrated through cracks and loose joints in the Tech Road sewer, thereby rendering WSSC liable under CERCLA. Westfarm's position was accepted by both the District Court and the Court of Appeals.

REASONS FOR GRANTING THE PETITION

I. *The Questions Presented Are Of National Importance.*

A. The Court of Appeals' Decision Saddles Municipalities and Sewer Authorities With The Potential For Immense CERCLA Liability.

WSSC has a network of approximately 4,000 miles of sewer pipe, with over 20,000 commercial users. Under the Court of Appeals' decision, every toilet, sink, shower, bath or drain along those 4,000 miles represents a potential source of CERCLA liability. If hazardous waste is placed in the sewer system at any of these locations, or through any industrial source along the system, the sewer system would be responsible for the cleanup of any property which was contaminated by even a single molecule of waste which leaked out of the sewer, even if other sources for the contamination existed.

The decision of the Court of Appeals, then, raises the *spec-*

tra of immense CERCLA liability for municipalities and local governments. Concrete pipes, by their nature, can leak. Accordingly, once hazardous waste is disposed of into a concrete sewer system, a sewer operator has no means by which it can insure that all hazardous waste remains within the pipe. Moreover, a sewer operator simply cannot monitor every sewer connection, twenty-four hours a day, 365 days a year. Nor can a sewer operator entirely control the actions of wrongdoers such as IFI who illegally dump hazardous substances into the sewer.

The lower court and the Court of Appeals decisions have generated considerable discussion in the environmental arena, partly because the decision conflicts with *Lincoln Properties, Ltd.v. Higgins*, 823 F. Supp. 1528 (E.D. Cal. 1992). In that case, the lower court found that a sewer system was not liable under CERCLA where hazardous substances were illegally placed into the sewer system and subsequently migrated out of the sewer line through cracks and loose joints. Commentators have debated whether the instant case or *Lincoln Properties* represents the proper application of CERCLA to sewer systems. *See, e.g.*, Robert M. Frye, Note, *Municipal Sewer Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute*, 14 Stan. Envtl. L.J. 61 (Jan. 1995); Peter R. Hinckley, Comment, *State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay For the Cleanup Of Hazardous Industrial and Commercial Sewer Discharges*, 22 B.C. Envtl. Aff. L. Rev. 89 (Fall 1994). As stated in 14 Stan. Envtl. L.J. at 95-96:

> The decision in *Westfarm*, if upheld, could lead to judgments against municipal sewerage authorities amounting to billions of dollars. Municipal sewerage authorities would have to pay the costs of litigation and judgment every time an industrial user of a

sewer system became liable under CERCLA. As a result, critical financial resources needed for sewer system upgrade and maintenance, wastewater treatment facilities, and the development and enforcement of pretreatment regulations would be needlessly diverted.

CERCLA's combination of a tax on generators and strict liability for site remediation "places the costs of releases of hazardous wastes on the sector most responsible for pollution and which benefits most from chemical production, rather than the victim or taxpayers." As stated by the District Court for the Central District of California, "an unmistakable purpose behind CERCLA's strict liability standard was to force the parties who profit from the use and generation of hazardous wastes, or directly cause or contribute to their release, to account, in the pricing of their products, for the environmental externalities associated with improper disposal."

Imposing liability on the WSSC, or requiring any municipality to absorb CERCLA liability under similar circumstances, violates the fundamental principle underlying CERCLA by impermissibly shifting the burden of remediating releases of hazardous substance directly to the taxpayer. This burden should be placed on those profit-making enterprises responsible for the discharge in the first place. The *Westfarm* decision misconstrues the congressional intent of CERCLA, misapplies several of its statutory provisions, excessively narrows the availability of the CERCLA third party defense, and contravenes sound public policy. The decision of the United States District Court for the District of Maryland in

> *Westfarm Associates Limited Partnership v. International Fabricare Institute* should be overturned.

(footnotes omitted).

WSSC, then, is not alone in its concern over the Court of Appeals' decision. Other governmental sewer systems throughout the country are equally concerned that they will be responsible for cleanup costs for any contaminated property located along a sewer line. Presently, there are over 19,000 such systems in the United States. By the year 2000, over 26,800 are expected to be operational. *See*, App. E at 79a. It would be impossible for these sewer systems to (1) dig up all the hundreds of thousands of miles of concrete sewers lines and replace them with leakproof sewers, which would be prohibitively expensive and technologically infeasible; or (2) prohibit the introduction of hazardous substances into all sewer lines (which is environmentally unnecessary and impossible to enforce). As stated in Env't Rep. (BNA) No. 42:

> David Kolker of American Communities for Cleanup Equity, a Washington, D.C. lobbying organization, said the ruling could subject taxpayers to open-ended liability for environmental contamination because virtually all municipal sewage systems carry, and consequently leak, hazardous substances.

Sewer Authority Appeal Ruled Too Early in Dispute Involving Municipality Liability, Env't Rep. (BNA) No. 42 (Feb. 6, 1995).

WSSC submits that, under the rationale of CERCLA, responsibility for cleanup should be placed on the person who disposes of waste into the sewer system, not the sewer operator who passes the cost on to the ratepayers or taxpayers.

B. A Split Of Authority Exists Concerning Whether Only The Original Source of The Discharge Of A Hazardous Substance Constitutes A Release Under CERCLA.

In order for there to be liability under CERCLA, there must be a "release" or "threatened release" from a "facility" which "causes the incurrence of response costs." 42 U.S.C. § 9607(a). At issue in this case is when does a "release" from a "facility" occur?

Courts throughout the country have wrestled with this issue. Some courts have held that only the original source of the discharge of a hazardous substance constitutes the release for which CERCLA liability attaches. For example, in *Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg. Ltd.*, No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992), Martin Oil Marketing Ltd. ("Martin Oil") was a former owner and operator of a gasoline service station that used several underground storage tanks ("USTs") to hold waste oil. The USTs leaked hazardous substances that migrated from the property and contaminated the plaintiff's water main. The plaintiff sued Martin Oil, which in turn, filed a third-party complaint against Abbott Contractors, Inc. ("Abbott"). Abbott had constructed and installed the water main that was subsequently contaminated by the hazardous substances that leaked from the USTs. Martin Oil argued that Abbott's facility released hazardous substances by leakage from the water main and should be held liable under CERCLA. Martin Oil's theory of liability was based in part on the claim that the same hazardous substances that it allegedly released from its USTs were again "released" by Abbott. In dismissing Martin Oil's third-party complaint against Abbott, the court held that there was no independent release at the water main site and that the release occurred solely from the leaking USTs located at the facility owned by Martin Oil. The court stated:

> Martin Oil's reading of the statute defies the bounds of common sense. . . . I cannot accept the notion of several different releases of hazardous substances when it is undisputed that all the wastes can [sic] from a single source. ... Indeed, only those hazardous substances which originated from the USTs contaminated the soil surroundings at the water main. Martin Oil's argument that Abbott should be held responsible for the release of hazardous substances which migrated onto the water main site from the Service Station is a perverted reading of CERCLA which this court will not follow.

Id. at 5 (citations omitted).

Viewing the original source of the discharge of hazardous substances as the release or disposal for which CERCLA liability attaches is consistent with the holdings in other well-reasoned opinions. For example, in *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989), the defendant released mercury from a manufacturing plant onto the bodies, clothing, and footwear of its workers. Such release resulted in the contamination of the workers' home plumbing systems and privately owned domestic septic systems, as well as the publicly owned sewer system and connecting public waste water treatment facility. In finding the defendant liable for releasing mercury into the environment, *the court viewed the release as encompassing the "[m]igration of hazardous chemicals by drainage to publicly owned sewers from home plumbing systems, and the seepage and leaching from domestic septic systems."* *Id.* at 832 (emphasis added). In other words, the defendant, as the original source of contamination, was liable for the contamination that occurred as a result of the migration, even through a sewer system. *Id.* at 834 ("[It is] established that the defendants released mercury to the

environment through the movement of workers to and from the ... facility.").

In many well-reasoned opinions, courts have rejected, as a matter of law, the imposition of CERCLA liability upon a party who was not the initial disposer or releasor but merely passively allowed the material to migrate into or through the environment. *United States v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1350-51 (N.D. Ill. 1992) (passive disposal does not trigger CERCLA liability); *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 988-89 (E.D. Mich. 1991); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1456-58 (N.D. Cal. 1989); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 21 Env't. Rep. Cas. 1108, 1113 (BNA 1984), *rev'd, in part, on other grounds*, 840 F.2d 691 (9th Cir. 1988); *In re Diamond Reo Trucks, Inc.*, 115 B.R. 559, 564-65 (W.D. Mich. 1990).

This view of CERCLA is consistent with the purpose of the statute as stated by the United States Supreme Court in *Pennsylvania v. Union Gas Co.* — namely, "impos[ing] the costs of the cleanup on those responsible for the contamination." 491 U.S. 1, 7, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989). *See also, United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) ("[t]he essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on 'those responsible for problems caused by the disposal of chemical poison'") *United States v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 486 (8th Cir. 1992) (CERCLA seeks "to place the cost of that response on those responsible for creating or maintaining the hazardous condition").

Admittedly, not all courts have adopted the position that CERCLA liability should be limited to the initial disposer or releasor. For example, the United States Court of Appeals

for the Fourth Circuit in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-846 (4th Cir. 1992), *cert. denied*, 121 L. Ed.2d 288, interpreted the "disposal" requirement of CERCLA so broadly as to require no conduct of any kind by any potentially responsible person. Westfarm has relied upon decisions from the First, Second and Fifth Circuits which have also read CERCLA "release" and "disposal" requirements broadly to include passive conduct. *See e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

Each of these cases, however, is factually distinguishable from the present case. In *Nurad*, the former owners of property on which underground storage tanks were discovered were held liable despite the fact that they did not actively participate in the disposal of the hazardous substances. 966 F.2d at 844-46. Unlike the instant case, however, the defendants in *Nurad* owned the property where the initial disposal took place. In addition, former tenants of the property, who also did not actively participate in the disposal, were *not* held liable because, similar to WSSC, they did not control that portion of the property where the hazardous substances were initially disposed. *Id.* at 842-43.

In *Dedham*, there was no question that a release had occurred from the defendant's facility and that the plaintiff's property had been contaminated. 889 F.2d at 1148-50. The issue was whether the plaintiff had to prove that this release physically migrated onto the plaintiff's property or whether it was sufficient for the plaintiff to prove that there were releases or threatened releases from the defendant's facility and that the plaintiff was caused to incur response costs, regardless of

whether physical migration actually occurred. *Id.* at 1150, 1154.

In *Tanglewood*, the defendants were present and past owners of the property where disposal took place. 849 F.2d at 1572-73. The Fifth Circuit refused to dismiss them from liability under CERCLA despite not actively participating in the initial discharge of the hazardous substances. *Id.* at 1573-74. The Court in *Shore Realty* likewise held that the present owners of the property where the disposal took place were liable despite purchasing the property after disposal occurred. 759 F.2d at 1045.

WSSC also submits that leakage from a sewer system cannot be a "release," as defined by 42 U.S.C. § 9601(22), which requires that the leakage must be "into the environment." "Environment" is defined by 42 U.S.C. § 9601(8) as "any ... surface water, ground water ... or subsurface strata." In most sewer systems, there are interconnections between surface water, ground water and sewer systems. Design standards for sewers have some allowance for leakage. *See*, 846 F. Supp. at 427, App. D at 52a-53a. As admitted by all experts below, concrete sewers by their nature leak. In this case, the Court of Appeals specifically recognized that ground water and surface water infiltrated into the Tech Road sewer. WSSC contends that the Tech Road sewer should be determined to be part of "the environment" as defined by 42 U.S.C. § 9601(8). Thus, a release occurred when IFI disposed of PCE by placing it into the sewer system which contained ground water and surface water. Because the sewer line was part of the environment, a release, as that term is defined by CERCLA, did not occur when PCE leaked from the sewer line. It was merely movement within different media in the environment. *See, Staco, Inc.*, 684 F. Supp. at 832 ("[m]igration of hazardous chemicals by drainage to publicly owned sewers from home plumbing systems" constitutes a "release" into the environment under CERCLA).

This case, then, raises significant issues which should be of concern to all landowners. If the Court of Appeals' decision is accepted, CERCLA would impose on landowners the obligation to not only police their own property, but to affirmatively monitor the waste disposal actions of others in the community. WSSC submits that CERCLA was never intended to have this breadth.

CONCLUSION

The petition for a writ of certiorari should be granted in order to address the issues presented, which are of extreme importance to the nation's sewer systems. This Court should also resolve the split of authority that exists over who has liability under CERCLA.

Respectfully submitted.

Randall M. Lutz
Patricia McHugh Lambert
Nathan J. Greenbaum

Attorneys for Washington
Suburban Sanitary Commission

December, 1995

APPENDIX A

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, Plaintiff-Appellee,

International Fabricare Institute Defendant & Third Party Plaintiff-Appellee,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION, Third Party Defendant-Appellant,

and

Prudential Insurance Company of America, Party in Interest.

No. 94-1425.

United States Court of Appeals,
Fourth Circuit.

Argued April 4, 1995.

Decided Sept. 27, 1995.

ARGUED: Randall Matthew Lutz, Smith, Somerville & Case, Baltimore, Maryland, for Appellant. Jeffrey Moore Johnson, Dickstein, Shapiro & Morin, L.L.P., Washington, DC, for Appellee. **ON BRIEF:** Patricia McHugh Lambert, Smith, Somerville & Case, Baltimore, Maryland; Nathan J. Greenbaum, General Counsel, Joel A. Kramer, Associate Counsel, Washington Suburban Sanitary Commission, Laurel, Maryland, for Appellant. Joel A. Fischman, Angus E. Crane, Dickstein, Shapiro & Morin, L.L.P., Washington, DC for Appellee.

Before MURNAGHAN and NIEMEYER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion, Judge MURNAGHAN wrote the opinion, in which Judge NIEMEYER and Senior Judge BUTZNER joined.

OPINION

MURNAGHAN, Circuit Judge:

Defendant-appellant Washington Suburban Sanitary Commission ("WSSC") operates a sewer system for Montgomery County, Maryland and Prince George's County, Maryland. Plaintiff-appellee Westfarm Associates Limited Partnership ("Westfarm"), a developer of property, owns land adjacent to one of WSSC's sewers. The sewer carries wastes from, among other places, the International Fabricare Institute ("IFI"), a trade association of dry cleaners and co-defendant below. Westfarm discovered on its property a trace of a hazardous substance, tetrochloroethylene (also known as perchloroethylene, perc, or "PCE"), which, Westfarm concluded, was flowing from IFI through leaks in the sewer system and contaminating the Westfarm property.

Westfarm sued IFI and WSSC as joint co-defendants for, *inter alia*, costs of response under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," popularly known as Superfund), 42 U.S.C. § 9607(a), and economic damages under a common law theory of negligence. The district court granted summary judgment for Westfarm on the CERCLA liability claim, and a jury found for Westfarm on the common law negligence claim.

WSSC now appeals on a variety of grounds, including, most prominently, public policy arguments for exempting sewer operators from liability for damage caused by wastes

dumped in the sewers by third parties. Finding no abuse of discretion or legal errors by the district court, and finding that this Court is not the appropriate forum for WSSC's public policy arguments, we affirm in all respects.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

In 1991, Westfarm engaged in negotiations to sell a particular parcel of property to a buyer. Just prior to closing the sale, an environmental audit uncovered the presence of PCE in the groundwater beneath the parcel.[1] PCE is a toxic organic solvent that is widely used in the dry cleaning business. As a result of the PCE contamination, the buyer terminated the contract to purchase the property. Further testing by Westfarm's environmental consultants traced the PCE to IFI, and adjacent landowner that had been conducting laboratory research with PCE to explore the efficacy of various dry cleaning techniques. On January 2, 1992, Westfarm filed suit against IFI. Westfarm has since cleaned up its property.

IFI and its predecessor had operated a commercial drycleaning facility at a site abutting Westfarm's parcel until 1974, at which time IFI began conducting research at the site. IFI's research department analyzed hundreds of PCE samples each year. At the conclusion of each analysis, the remnants of the samples were poured down a sink drain into the connected sewer line. Each test remnant typically included ten milliliters of PCE. From 1974 to early 1992, IFI annually disposed of at least three gallons of PCE into the sewer line in this manner. IFI also placed trash contaminated with PCE into a dumpster located on IFI's land.

Whenever IFI poured PCE down the drain, the PCE

[1]Subsequent testing revealed the presence of PCE on two other, adjoining Westfarm properties.

entered a sewer lateral connecting IFI's building with a main sewer line running along Tech Road (the "Tech Road sewer"), which is owned and operated by WSSC. Most of the sewer lateral is owned and operated by IFI, but WSSC owns and operates a part of the sewer lateral (the "sewerhouse connection") which extends from WSSC's Tech Road sewer to the IFI property line, and which contains a manhole through which the sewer lateral can be reached. The sewerhouse connection meets the terminal end of the Tech Road sewer, which runs beside the portion of Westfarm's property abutting Tech Road.

In July of 1992, environmental consultants conducted a joint groundwater survey and eliminated other surrounding landowners as a potential source of the PCE on Westfarm's property; groundwater in the area flows to the southeast, and whereas groundwater just north of the sewer lateral contained no PCE, groundwater to the southeast of the sewer lateral contained high concentrations of PCE. In August of 1992, Westfarm conducted a video camera inspection of IFI's sewer lateral. In order to do so, Westfarm served a subpoena upon WSSC to gain access to the sewer lateral through WSSC's sewerhouse connection, which cameras could enter through the manhole. That inspection revealed a number of flaws in IFI's sewer lateral. Water samples taken within WSSC's manhole contained PCE.

On November 16, 1992, IFI sought leave to file a third-party complaint against WSSC asserting both Maryland common law claims and federal statutory claims under CERCLA. WSSC was informed of IFI's motion by Westfarm's counsel on December 14, 1993 at IFI's deposition of one of WSSC's employees. The motion was granted on January 12, 1993, and WSSC became a party to the suit. Westfarm subsequently amended its complaint by adding WSSC as a direct defendant as well.

On April 9, 1993, a video camera inspection of WSSC's Tech Road Sewer was conducted, revealing numerous flaws along the length of the line, including open joints, improper alignment resulting in sags in the line and offset joints, cracks, broken pipes, improperly installed gaskets and improper manhole construction. Although IFI had stopped its practice of dumping PCE several months earlier, water and sediment samples taken within the Tech Road Sewer revealed elevated levels of PCE, including the highest level found in any sample at the site—110,000 parts per billion (ppb) PCE in the sediment at WSSC's manhole.[2] One of Westfarm's experts, George Frigon, opined that the Tech Road Sewer was neither built in a workmanlike manner nor properly repaired.

WSSC's Tech Road Sewer was constructed in 1968. In 1969, IFI's predecessor applied to WSSC to connect its facility to the sewer, indicating to WSSC that it intended to operate a drycleaning plant at the site. In mid-1974, IFI informed WSSC that it intended to operate a laboratory at the site. IFI wrote to WSSC describing, among other things, the quantities and types of chemicals that would be going down the drain at IFI's laboratory, including many hazardous substances, but not including PCE. WSSC received and approved both plumbing permit applications.

WSSC initiated a survey of its sewer system in 1977. The survey was intended to identify those portions of the lines within the system that exhibited excessive infiltration, *i.e.*, leakage of groundwater or surface waters into the sewer

---

[2]By way of comparison, the maximum contaminant level for PCE in drinking water, as established by the Environmental Protection Agency, is 5 ppb. 42 U.S.C. § 300g-1; 40 C.F.R. § 141.61. The PCE concentration in the groundwater beneath IFI's and Westfarm's properties ranged from several hundred ppb to approximately 7000 ppb.

system (which results in added costs of transporting and treating the extraneous flows). During the survey, the Tech Road sewer segment closest to IFI was identified as exhibiting excessive flow, and the final report from the survey indicated that ten internal grouting repairs were needed, and supposedly were made, in the segment. However, neither Westfarm's nor IFI's sewer experts found any evidence in their 1993 video inspection that such repairs had been made.

In 1977, the EPA issued a report to Congress detailing waste disposal practices (including sewers) and their effects on groundwater. The EPA stated that "[t]he major cause of ground-water contamination from sanitary sewer systems (if above the water table[3]) is through outflow leakage (exfiltration) from gravity sewers." Common factors causing such leakage include poor workmanship, cracked or defective pipe and poorly constructed manholes. In response, in 1978, Congress amended the Clean Water Act to regulate toxic pollutants (including PCE) discharged into sewer systems.

In 1979, WSSC hired environmental consultants to develop a pretreatment program to respond to the amendments to the Clean Water Act. In 1980, the consultants prepared a booklet containing guidelines for industrial users about the program. Toxic pollutants such as PCE were identified specifically as objects of the program.The booklet, along with a questionnaire demanding information about discharges to WSSC's sewer system, were designed to be sent to industrial users, such as IFI. WSSC's industry file on IFI, however, included no such questionnaire and no evidence that IFI had even received the booklet.

In 1981 and again in 1984, two industrial investigation reports

[3]The Tech Road Sewer is above the water table.

on IFI were conducted by WSSC or its consultants. The reports noted that gallons of PCE were stored next to floor drains on the premises, that commercial size drycleaning machines were in use, and that IFI's labs were performing tests on solvents. Neither report listed PCE wastes as one of the types of waste being disposed down the sewer.

Prior to 1983, WSSC's regulations placed no clear limit on the concentrations of toxic organics like PCE that could be disposed into the sewer. In 1983, WSSC, for the first time, limited the total toxic organics ("TTOs") permitted to be discharged to the sewer system to 0.58 milligrams per liter (mg/l). In 1988, WSSC revised the regulations to correspond with new EPA standards, changing the concentration of TTOs which could be discharged to the sewer system to 2.13 mg/l, where it remained at the time of trial.[4] Dr. Leonard Breitstein, a senior engineer with Westfarm's environmental consultants, testified that from 1983 to 1989 IFI was not in compliance with the PCE concentration limits, but that IFI was in compliance from 1990 to 1991. Michael Armorer, manager of WSSC's Industrial Discharge Control Unit, stated that WSSC was aware that laboratories routinely dispose of small amounts of chemicals into the sewer system and that WSSC knew IFI was doing so as far back as June 1974.

---

[4]We note that WSSC's regulations directly limit the concentration of TTOs discharged, not the quantity of TTOs discharged. The quantity of TTOs which may be discharged is therefore only limited by the total discharges of a sewer user.

WSSC regulations prohibit disposal into the sewer of "any noxious or malodorous gas or substance, which either singly or in interaction with other wastes, is capable of creating a public nuisance or hazard to life or preventing entry into sewers for their maintnance and repair." However, in light of the fact that concurrent regulations discussed *supra* permitted the discharge of PCE and other TTOs, PCE is apparently not within the definition of a noxious or malodorous substance.

While Westfarm and IFI were conducting the discovery which brought forth the foregoing evidence, WSSC, despite having been added as a party in January of 1993, conducted little, if any, discovery. On April 27, 1993, less than two weeks before the May 7 discovery cut-off date, WSSC moved for a continuance of the discovery cut-off, but withdrew the motion before the district court had ruled on it.

In July of 1993, Westfarm, WSSC, and IFI all moved for summary judgment. WSSC also moved to dismiss the complaint on the grounds that, *inter alia*, Westfarm had not given WSSC timely notice of the claims. The district court denied WSSC's motion to dismisss. On July 16, 1993, the district court granted Westfarm's motion for summary judgment against WSSC and IFI on its CERCLA claims. *See Westfarm Assocs. Ltd. Partnership v. International Fabricare Inst.*, 846 F.Supp. 422 (D.Md.1993). WSSC filed a motion for reconsideration of the CERCLA judgment, which was denied. After a hearing in October of 1993, Westfarm was awarded $140,930 in recoverable response costs under CERCLA.

The common law causes of action against IFI and WSSC were tried before a jury beginning on July 19, 1993. Prior to trial, the district court granted WSSC's motion *in limine* to prevent the admission of evidence or argument that WSSC had a duty to enact or enforce regulations which would have prevented IFI from putting PCE in the sewer system. WSSC moved for a directed verdict after the close of Westfarm's case, on the grounds that, *inter alia*, Westfarm had failed to produce sufficient expert testmony of the standards of care owed by sewer operators. The district court denied the motion. On July 30, 1993, the jury returned a verdict against WSSC for negligence, in favor of WSSC for nuisance and trespass and strict liability. The jury awarded damages on the common law claims to Westfarm against IFI and WSSC,

jointly and severally, in the amount of $2.5 million. Judgment was entered accordingly on August 4, 1993.

On August 5, 1993, WSSC moved to reduce the amount of the jury's judgment based on a Maryland statutory cap on the liability of certain governmental entities. The district court denied the motion. *Westfarm Assocs. Ltd. Partnership v. International Fabricare Inst.*, 846 F.Supp. 439, 441 (D.Md.1993).

WSSC now appeals.

II. *DISCUSSION*

A. *Notice:*

WSSC is an agency of the State of Maryland. Md.Ann.Code art. 29, § 1-101 *et seq.*; *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 397 A.2d 1027, 1031 (1979). For purposes of Maryland's Local Government Tort Claims Act ("LGTCA"), however, WSSC is treated as a local government, and is therefore subject to the provisions of the LGTCA. Md.Cts. & Jud.Proc. Code Ann. § 5-401(d)(7).

The LGTCA generally requires that plaintiffs give local governmental defendants notice of any action for unliquidated damages within 180 days of the claim's accrual. *Id.* § 5-404(a). An exception in the statute provides that "unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given." *Id.* at § 5-404(c). In the instant case, Westfarm did not give notice to WSSC within 180 days, but the district court waived the LGTCA notice requirement on the grounds that Westfarm had shown good cause for the delay and WSSC had not shown prejudice from the delay. WSSC now challenges the distict court's waiver, which

we review for abuse of discretion, *see Madore v. Baltimore County*, 34 Md.App. 340, 367 A.2d 54, 57-58 (1976).

[1] The test for showing "good cause" for the purposes of an LGTCA notice waiver is " 'whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.' " *Madore*, 367 A.2d at 57 (quoting *Lee v. Houston Fire & Casualty Co.*, 530 S.W.2d 294, 296 (1975)). In the instant case, the circumstances involved environmental contamination, the source and causation of which typically require lengthy investigation for even an extraordinarily diligent person to discern. *Cf. Lamb v. Global Landfill Reclaiming*, 111 N.J. 134, 543 A.2d 443, 451-52 (1988) (holding that courts should take into account particular difficulties of proof inherent in environmental pollution claims when waiving the analogous notice provision of New Jersey law). Westfarm promptly investigated the source of PCE as soon as PCE was discovered on its property. Once IFI was identified as a source, Westfarm immediately instituted suit against IFI. In the course of further investigation, Westfarm put WSSC on notice of the contamination by requesting extensive discovery, including a video camera inspection of WSSC's sewers in August of 1992. In November 1992, IFI instituted suit against WSSC, and Westfarm amended its complaint to add WSSC as a defendant in early 1993. Under these circumstances, it was not an abuse of discretion for the district court to have found that Westfarm exercised reasonable diligence, and thus had shown "good cause" for waiving the LGTCA notice requirement.

[2] WSSC claims that it was prejudiced by the failure to comply with the 180-day notice requirement. According to WSSC, Westfarm conducted key depositions before WSSC was on notice of suit, and WSSC would have been able to protect

its interests if it had received notice of the depositions. WSSC, however, has not pointed to anything it would have done at these depositions which could have "protected its interests." Moreover, circumstantial evidence indicates that WSSC would have done nothing; WSSC did not engage in discovery until months after it became party to the suit, and although WSSC moved to continue the discovery cut-off, it withdrew the motion prior to obtaining a ruling by the district court. In light of those facts, WSSC has failed to show prejudice. Under the circumstances, the district court did not abuse its discretion in waiving the notice requirement.

B. *CERCLA:*

[3, 4] Congress enacted CERCLA to protect public health and the environment from inactive hazardous waste sites. H.R.Rep. No. 1016(I), 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119. CERCLA is a comprehensive remedial statutory scheme, and as such, the courts must construe its provisions liberally to avoid frustrating the legislature's purpose. *E.g., United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir.1992); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.1986). CERCLA encourages private individuals to clean up environmental hazards by permitting them to recover specified costs of cleanup from parties defined by CERCLA to be responsible for the hazards. *E.g., Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992). Potentially responsible parties under CERCLA are strictly liable for cleanup costs, *e.g., United States v. Monsanto Co.*, 858 F.2d 160, 167 & n. 11 (4th Cir.1988) ("[T]he overwhelming body of precedent . . . has interpreted [CERCLA] as establishing a strict liability scheme."), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104

L.Ed.2d 1019 (1989), subject only to the statute's narrow defenses for damages caused solely by acts of God, war, or third parties. 42 U.S.C. § 9607(a), (b).

In order to recover the costs of cleanup under CERCLA, a plaintiff must show (1) that the defendant "owned or operated" a "facility" from which there was a "release" or "threatened release" of a hazardous substance, (2) that the defendant is a "potentially responsible person," and (3) that the plaintiff incurred necessary cleanup costs "consistent with the national contingency plan." 42 U.S.C. §§ 9601(9), 9601(20), 9601(22), 9605, 9607(a); *see generally New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-42 (2d Cir.1985) (overview of CERCLA). Upon Westfarm's motion for summary judgment against WSSC on liability under CERCLA, the district court found that the undisputed facts established all of these elements.

In reviewing a grant of summary judgment, we must apply a *de novo* standard of review, drawing all reasonable inferences in favor of the nonmoving party. *E.g., Carolina Transformer*, 978 F.2d at 835. Summary judgment is proper when no genuine disputes of material fact remain, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). WSSC contends that summary judgment should have been granted for, rather than against, it on Westfarm's claim under CERCLA. WSSC argues that on the undisputed facts, it was not an operator of a "facility" and its actions did not constitute a "release." WSSC also argues that genuine disputes of material fact existed as to whether WSSC had caused a release or was instead entitled to the third party "innocent landowner" defense.

1. *Definition of "Facility" Under CERCLA.*

> A "facility" is defined under CERCLA as: (A) any building, structure, installation, equipment, pipe, or pipeline (including any pipe into a sewer or publicly owned treatment works[5]), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

WSSC argues that the language of the statute evinces a Congressional intent to exclude "publicly owned treatment works," or POTWs, such as WSSC's sewer, from the definition of "facility." WSSC notes that to conclude that a POTW is a "facility" would be to render the parenthetical language above, "including any pipe into a sewer or publicly owned treatment works" surplusage, contrary to traditional rules of statutory interpretation. *See, e.g., Ratzlaf v. United States*, ____ U.S. ____, ____, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994) (cautioning that courts should hesitate to interpret statutes in ways that make some of their language mere surplusage). Looking only to the subpart of the statute quoted above, WSSC is correct that to read the statute to include POTWs renders the parenthetical language surplusage; if POTWs are included in the definition of "facility," the words "pipe or pipeline" with no further explanation would suffice.

[5] Reading CERCLA as a whole, however, as we must when interpreting a statute, *see, e.g., United States v.*

---

[5]A sewer system is a publicly owned treatment works.

Thompson/Center Arms Co., 504 U.S. 505, 512 n. 5, 112 S.Ct. 2102, 2107 n. 5, 119 L.Ed.2d 308 (1992) ("normal canons of construction caution [courts] to read the statute as a whole"), leads to the inescapable conclusion that Congress did not intend to exclude POTWs from liability. Congress expressly abrogated state sovereign immunity under CERCLA, *see Pennsylvania v. Union Gas Co.*, 490 U.S. 1, 8, 109 S.Ct. 2273, 2278, 105 L.Ed.2d 1 (1989) ("Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA."), thereby subjecting "facilities" owned and operated by state governments to liability. A narrow exception to the definition of "owner or operator," however, was carved to exclude state and local governments from liability when they have acquired ownership of a facility "involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title." 42 U.S.C. § 9601(20)(D). The traditional maxim of statutory interpretation that "the inclusion of one is the exclusion of the other," *Glickstein v. United States*, 222 U.S. 139, 142, 32 S.Ct. 71, 73, 56 L.Ed. 128 (1911), reminds us that if Congress had intended to exclude state and local governments from liability in other situations—such as when they, through their POTWs, are otherwise liable under CERCLA—Congress would have either: (a) excluded all state and local governments from the definition of "owner or operator," rather than limiting the exclusion to the involuntary acquisition situation; or (b) included POTWs in the list of entities excluded from the definition of "owner or operator." *Cf. Key Tronic Corp. v. United States*, ____ U.S. ____, ____, 114 S.Ct. 1960, 1967, 128 L.Ed.2d 797 (1994) (Congressional inclusion of provisions for fee awards in some situations under CERCLA strongly suggests a deliberate decision not to award fees in other situations). In the context of the entire statute, it appears that Congress added the language, "including any

pipe into a sewer or publicly owned treatment works," to emphasize the point that pipes leading into sewers or POTWs are the responsibility of the owner or operator of the pipes, not the sewer or POTW. *See United States v. Powell*, 379 U.S. 48, 56, 85 S.Ct. 248, 254, 13 L.Ed.2d 112 ("Our reading of the statute is said to render [one clause] surplusage to a large exent, for, as interpreted, the clause adds little. . . . [B]ut we think its primary purpose was no more than to emphasize [a point].").

[6] WSSC also argues that the fact that the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") permit certain levels of hazardous materials, including PCE, to be discharged into sewer systems, demonstrates that Congress could not have intended then to make sewer systems operators liable for the foreseeable sewer leaking of the PCE which was permitted to be in the pipes in the first place. WSSC fails to recognize, however, that Congress is unlikely to have assumed that sewer systems would keep their pipes in poor repair, thus drastically increasing the possibility that chemicals which travel through the pipes would leak into the environment. Moreover, WSSC's argument fails to take account of the different purposes served by CWA and RCRA on the one hand, and CERCLA on the other. As explained by the Second Circuit, in rejecting a similar argument:

> RCRA is preventative; CERCLA is curative. It does not follow that because the environmental risk posed by household waste is deemed insufficient to justify the most stringent regulations governing its day-to-day handling that the environmental harm caused when that risk is realized is insufficient to require holding liable those responsible for that harm. . . . Even total compliance with [RCRA] regulations will not prevent releases or avoid CERCLA liability.

B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1202-03 (2d Cir.1992).[6] Congress's remedial purposes in enacting CERCLA are best served by including POTWs within the term "facilities," irrespective of the prospective regulations in CWA and RCRA.

[7] Finally, WSSC warns us that we should not interpret "facilities" to include POTWs because to require state and local governments to pay for the cleanup of wastes dumped by others into sewers would be unfair—because taxpayers generally will foot the bill for the polluters — and unwise — because polluters will not internalize their own externalities. From an fairness perspective, WSSC's argument may appear meritorious. To make taxpayers, including taxpayers who do not use dry cleaners, pay for remedying damage caused by dry cleaning seems unfair—the people who used dry cleaners and the dry cleaning companies were the only ones who benefitted from the dry cleaning prices which, when IFI was dumping PCE in the sewer, were presumably lower than the dry cleaning prices would have been if IFI had been paying to dispose of PCE properly. From an economic efficiency perspective, WSSC may also have a strong argument. When industries pay for all costs, including any environmental cost, incurred in producing goods and services, the prices of those goods and services will reflect the real costs, and welfare-maximizing consumers will steer the economy in the most efficient direction. For example, if dry cleaning prices, once the cost of disposing of wastes safely was internalized, were $25 per shirt rather than $2 per shirt, people probably would start wearing more shirts which could be washed in the washing

[6]RCRA excludes household wastes from stringent regulation, *see* 42 U.S.C. § 6903(27), yet a garbage dump can still be liable under CERCLA for cleanup costs for damages caused by hazardous substances released from household wastes. *See Goodrich*, 958 F.2d at 1201-03.

machine, and utility would be maximized.

However, contrary public policy arguments come to mind quickly. First, in light of the fact that many small business polluters are no longer in business or have pockets too shallow to pay for costs of environmental cleanup, all taxpayers, who are all hurt by pollution, benefit from paying for the cleanup rather than facing no cleanup at all. *Cf. Shore Realty*, 759 F.2d at 1045 ("Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof."). Second, all taxpayers benefitted from lower tax rates during the period when WSSC failed to spend funds needed to mend leaks in the sewer pipes. Finally, although Congress can regulate pollution so as to internalize environmental costs in the future, Congress cannot turn back the clock and truly internalize the costs of past pollution because the people who bought dry cleaning at the former, artificially low prices are not necessarily the same people who would buy dry cleaning at the artificially high prices which would occur if the dry cleaner were now forced to pay all of the costs of past pollution. The infeasibility of perfectly internalizing past costs compared to the potentially perfect ability to internalize future costs may explain why Congress limited the liability of POTWs under RCRA and CWA, both forward-looking statutes, yet did not exempt POTWs from liability under CERCLA, a remedial statute. *See Goodrich*, 958 F.2d at 1202.

We sit as a court, not a super-legislature. While the public policy arguments raised by WSSC may be meritorious, we can only presume that those arguments were weighed and rejected by Congress when it enacted CERCLA without including a broad exemption for state and local governments or their POTWs. Therefore, we affirm the district court's finding that WSSC's sewer pipes are a "facility" under CERCLA.

2. *Definition of "Release" Under CERCLA.*

[8] According to WSSC, the movement of PCE through cracks in WSSC's sewer onto Westfarm's land should not be considered a "release" under CERCLA. We, like the district court, reject WSSC's contention.

A "release" is defined under CERCLA as:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . .

42 U.S.C. § 9601(22). The Fourth Circuit has interpreted the words "leaking" and "spilling" in CERCLA's parallel, extremely broad definition of "disposal" to include passive conduct. *See Nurad*, 966 F.2d at 845. For example, if tanks which have been placed on a defendant's land by a previous owner leak contaminants, the subsequent owners, who did not place the tanks or their contents on the land, potentially are liable as owners or operators at the time of a "disposal." *See id.* at 845. The plain meaning of the statute supports the *Nurad* reading; "leaking," "leaching," and "escaping" are all words which imply passive conduct.

WSSC urges us to distinguish *Nurad* on its facts, arguing that *Nurad* involved subsequent owners of facilities which released hazardous material, but did not address the question of migrating releases which travel through various properties. WSSC claims that to find that the leaking from WSSC's sewers was a release would lead to the "unfair" result that Westfarm would be liable if contaminants leaked onto its land and then flowed onto another's land. However, we see no reason to limit the holding in *Nurad* to those "multiple releases"—*i.e.*, releases from a defendant's property where the defendant was not the first person to release the hazardous material, but is releasing a hazardous material which

previously has been released by another—which are non-migrating. CERCLA is designed to insure cleanup of the environment, and our inclusion of "multiple releases"—whether separated in time or in space—within the definition of "release" best effectuates CERCLA's remedial goals. Our sister circuits which have considered the question agree that CERCLA imposes liability for multiple releases. *See e.g., Dedham Water,* 889 F.2d at 1151 (1st Cir.); *Tanglewood East Homeowners v. Charles-Thomas, Inc.,* 849 F.2d 1568, 1573 (5th Cir.1988) (refusing to limit "disposal" to a one-time occurrence because "there may be other disposals when hazardous materials are moved, dispersed or released. . . ."); *Shore Realty,* 759 F.2d at 1045 (2d Cir.); *see also Lincoln Properties Ltd. v. Higgins,* 823 F.Supp 1528, 1536-39 (E.D.Cal.1992). *But see, e.g., Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.,* 976 F.2d 1338, 1342 n. 7 (9th Cir.1992) (declining to reach issue of whether a passive second releaser in a multiple release scenario may be held liable).

Moreover, we may speculate that Westfarm cleaned up the PCE on its property in part because of fear of future CERCLA liability if the PCE on its land one day were to flow onto another's land. As we explained in *Nurad,* "[a] CERCLA scheme which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind." *Nurad,* 996 F.2d at 845-46. Although the simplistic slogan, "make the polluter pay," may have helped propel CERCLA into law, *see, e.g., Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Living Trust,* 32 F.3d 1364, 1369 (9th Cir.1994), the statutory scheme does not take a simplistic view of who is and is not a "polluter." In the instant case, WSSC's failure to maintain its pipes in good condition earned it some responsibility for the contamination, and therefore we find no inconsistency between the notion that CERCLA "imposes the costs of cleanup on those responsible

for the contamination," *Union Gas*, 491 U.S. at 7, 109 S.Ct. at 2277, and the notion that the leaking of PCE from WSSC's sewers constituted a release. Therefore the district court did not err in holding that the PCE leaking from WSSC's sewers was a release within the meaning of CERCLA.

3. *General Dispute of Material Fact as to Causation.*

[9] Contrary to the rule followed in most areas of the law, the burden of proof as to causation in a CERCLA case lies with the defendant. *See, e.g., In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 893 n. 4 (5th Cir.1993) (citing cases); *Monsanto*, 858 F.2d at 170 & n. 17. The plaintiff must prove only that contaminants which were once in the custody of the defendant could have travelled onto the plaintiff's land, and that subsequent contaminants (chemically similar to the contaminants once existing in defendant's custody) on the plaintiff's land caused the plaintiff to incur cleanup costs. *See Monsanto*, 858 F.2d at 169. *Cf. White v. County of Newberry, South Carolina*, 985 F.2d 168, 174 (4th Cir.1993) (finding that because plaintiffs had not shown that contaminants were ever located on defendant County's land, grant of summary judgment in favor of County on CERCLA claim was proper). The plaintiff need not produce any evidence that the contaminants did flow onto its land from the defendant's land. Rather, once plaintiff has proven a *prima facie* case, the burden of proof falls on the defendant to disprove causation.

Congress adopted this unique allocation of the burdens of proof after specifically rejecting a version which would have required the plaintiff to prove causation. *See Monsanto*, 858 F.2d at 170 n. 7. As we have explained elsewhere:

> In deleting causation language from section 107(a) [of CERCLA], we assume as have many other courts, that

> Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source.

Id. at 170. Because the defendant bears the burden of proof as to causation, a defendant, to survive summary judgment, must come forward with sufficient evidence from which a jury could find that the defendant was *not* the source of the contamination.

[10] WSSC asserts that it met that burden by producing the following evidence: (1) an affidavit of an expert, Dr. Ram, stating that "[c]urrent evidence does not substantiate the WSSC sewer as a source of PCE contamination to the underlying acquifer,"[7]; (2) "WSSC's ability to produce evidence that the sewer did not leak." The second contention is false; WSSC never produced any evidence that the sewer did not leak, and, on the contrary, Westfarm produced abundant evidence that the sewer did leak. The first piece of evidence, too, did not serve to meet WSSC's burden because Dr. Ram's statement does not indicate that WSSC could *disprove* causation—only that the evidence did not *prove* causation. Because the burden lay on WSSC to *disprove* that it was a source of PCE, the fact that the evidence on summary judgment produced a genuine dispute as to whether the evidence *proved* WSSC to be a source was not material, and could not serve as a basis to deny summary judgment to Westfarm. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d

[7]At trial, Dr. Ram expounded on his testimony, and indicated that in his expert opinion, the PCE on Westfarm's land had travelled there from a dumpster on IFI property into which IFI had placed PCE-contaminated trash, rather than from WSSC's sewer. However, apparently the jury did not believe his testimony, as the jury held WSSC liable in negligence for the PCE cobntamination. Moreover, his testimony was not before the district court on Westfarm's motion for summary judgment, and it cannot be used now to manufacture a genuine issue of material fact as to whether WSSC had disproved causation.

265 (1986) (holding summary judgment is proper against non-moving party who fails to produce evidence "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

A similar situation existed in *Artesian Water Co. v. New Castle County*, 659 F.Supp. 1269 (D.Del. 1987), *aff'd* 851 F.2d 643 (3d Cir.1988). In that case, summary judgment was granted despite the defendant's submission of an expert affidavit opining that the toxic wastes at issue could not be shown, with "any reasonable degree of probability," to have emanated from defendant's site. *Id.* at 1281. The fact that the evidence did not prove causation, did not create a genuine dispute as to whether the defendants could state with any reasonable degree of probability that the toxic wastes did not emanate from defendant's site. *Id.* at 1282. As in *Artesian Water*, summary judgment was appropriate here, because the defendant did not produce a genuine dispute of material fact as to noncausation.[8]

4. *Innocent Landowner Defense Under CERCLA.*

[11] CERCLA provides "a limited affirmative defense based on the complete absence of causation," *Monsanto*, 858

[8]WSSC attempts to distinguish *Artesian Water* by claiming that the expert in that case was testifying about contamination of "sites" beyond the defendant's land, not about the plaintiff's land. However, the plaintiff's land was one of the "sites" beyond the defendant's land, and thus was included in the expert's opinion. *Artesian Water*, 659 F.Supp at 1281. The expert was simply stating the no longer remarkable proposition that tracing pollution from one site to its source is technologically infeasible. *See, e.g., Monsanto*, 858 F.2d at 170. The district court in *Artesian Water* properly found that such expert opinion did not create a genuine issue of material fact as to whether the defendant could disprove that it was the source of contamination at plaintiff's site.

F.2d at 168, known as the "innocent landowner defense." The elements of this "third party defense" are the following, each of which must be proven by the defendant by a preponderance of the evidence: (1) that another party was the "sole cause" of the release of hazardous substances and the damages caused thereby; (2) that the other responsible party did not cause the release in connection with a contractual, employment, or agency relationship with the defendant; *and* (3) that the defendant exercised due care and guarded against the foreseeable acts or omissions of the responsible party. 42 U.S.C. § 9607(b)(3). We find that WSSC failed to produce sufficient evidence of the "due care" element of the defense.[9]

The "due care" element of the third party defense requires the defendant to prove that it "exercised due care with respect to the hazardous substance concerned," and that it "took precautions against foreseeable acts or omissions of any . . . third party." *Id.* WSSC claims that it presented sufficient evidence from which a reasonable jury could find that it exercised due care and took precautions against foreseeable acts of IFI. WSSC claims that IFI's acts of dumping PCE into the sewers were unforeseeable, and therefore due care did not require WSSC to take any precautions.

[12] As we previously have explained in connection with a landowner's claim that a tenant's waste disposal was unforseeable, CERCLA does not sanction "willful or negligent blindness." *Monsanto,* 858 F.2d at 169; *see also Shore Realty,* 759 F.2d at 1049 (finding that defendant landowner who was aware of the nature of tenants' activities could have foreseen dumping of hazardous waste). The undisputed evidence at summary judgment indicated that WSSC knew from

[9]We therefore do not need to reach the question of whether the other two elements were shown.

inspecting IFI's facility that IFI used PCE and knew that IFI poured hazardous substances into the sewer. In fact, WSSC regulations permitted discharges of certain quantities of toxic organics and other hazardous substances. WSSC was also aware that cracks were present in its sewer. Yet WSSC took no precautions—such as mending the pipes or banning the discharge of toxic organics—against the foreseeable result that hazardous substances such as PCE would be discharged into the sewer. *CF. Lincoln Properties,* 823 F.Supp. at 1542-43 (holding County sewer authority entitled to assert innocent landowner defense where the County "took reasonable precautions to prevent releases of hazardous substances" and "no evidence [existed] that the County could or should have foreseen the releases."). WSSC had the power to abate the foreseeable release of PCE, yet failed to exercise that power. In light of such failure, we cannot find that any genuine dispute was created that WSSC exercised due care or took precautions against the foreseeable acts of third parties such as would have entitled it to the "innocent landowner" defense. *Cf. Nurad,* 966 F.2d at 842 (in interpreting definition of "operator," declining "to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup.").

[13] Finally, WSSC's policy argument that CERCLA liability in the instant case will force sewer operators to fear liability from "every toilet, sink, shower and bath," falls flat. If domestic users of sewers do not foreseeably release hazardous materials into the sewer system, the third party defense will allow WSSC to avoid liability for an unforeseeable dumping of hazardous substances into domestic plumbing.

Because no genuine issue of material fact remained, the district court properly entered summary judgment for Westfarm on the CERCLA liability claim.

C. *Negligence:*

Westfarm asserted negligence as a state law claim—under both diversity and pendent jurisdiction—against WSSC. Thus, Maryland law applies to the issues of duty and proximate cause raised on appeal. *See Erie R.R. v. Tompkins*, 304 U.S. 64,78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). Negligence under Maryland law consists of the familiar common law elements:

> "First, the defendant must be under a duty to protect the plaintiff from injury. Second, the defendant must fail to discharge that duty. Third, the plaintiff must suffer actual loss or injury proximately resulting from that failure."

Hartford Insurance Co. v. Manor Inn of Bethesda, Inc., 335 Md. 135, 642 A.2d 219, 225 (1994) (quoting *Lamb v. Hopkins*, 303 Md. 236, 492 A.2d 1297, 1300 (1985)).

WSSC challenges the district court's holding that it had a duty to Westfarm, and the district court's finding that sufficient evidence of proximate cause had been produced to send the case to the jury. Thus, WSSC argues that it was entitled to a directed verdict on the negligence claim. We review a denial of a motion for a directed verdict *de novo*, employing the same standard used by the district court—whether viewing the evidence in the light most favorable to the opposing party, a reasonable jury could come to but one conclusion. *See County of Newberry*, 985 F.2d at 172-73; *Gairola v. Virginia Dep't of General Servs.*, 753 F.2d 1281, 1285 (4th Cir.1985).

1. *Duties of Sewer Operators.*

WSSC asserts that, as a matter of law, a sewer operator has no duty to protect adjacent landowners from pollutants originating with other landowners, and that Westfarm was permitted to present inadmissible evidence to the jury on the duty issue. Westfarm replies that WSSC owed Westfarm a duty

of reasonable care in the construction, maintenance, and operation of its sewer, and that its evidence regarding the duty was proper. A trial court's finding of a duty of reasonable care is a legal question reviewed *de novo*. *See Eisel v. Board of Educ.*, 324 Md. 376, 597 A.2d 447, 452-56 (1991) (determining existence of a duty as a matter of law). A decision to admit evidence is reviewed for an abuse of discretion. *See Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 111 (4th Cir.1995).

[14] a. *Public duty exception*. WSSC, as a state agency, ordinarily would be entitled to sovereign immunity from any common law claims such as negligence. *See Katz*, 397 A.2d at 1032. In 1927, however, Maryland waived WSSC's sovereign immunity, Md. Code Ann. art. 29, § 1-201, and Maryland courts have since held that WSSC can be sued, *Katz*, 397 A.2d at 1034. Specifically, WSSC can be sued for negligent construction, maintenance, and operation of its sewer systems, *Katz* 397 A.2d at 1028-29 (holding that plaintiffs could state claims against WSSC for negligence when WSSC's water main burst and caused flooding, and when rocks and debris in WSSC's fire hydrants caused fire hoses to become clogged), as can local governments operating sewer systems, *e.g.*, *True v. Mayor of Westernport*, 196 Md. 280, 76 A.2d 135, 136 (1950) ("A municipality is liable not only for negligence in the construction of a sewer, but also for negligence in failing to keep it in proper repair.") (citation omitted). The rationale for permitting suits against sewer systems run by localities was based upon the governmental-proprietary function distinction in Maryland municipal government law, *see Maryland-National Capital Park & Planning Comm'n v. Kranz*, 308 Md. 618, 521 A.2d 729, 731 (1987) (explaining governmental-proprietary distinction); *Birge v. Town of Easton*, 274 Md. 635, 337 A.2d 435, 438 (1975) (holding that "a municipality which operates a utility acts in a business or proprietary, rather than a governmental capacity. . . ."); *Taylor v. Mayor of Baltimore*, 130

Md. 133, 99 A. 900, 904-05 (1917) (holding that municipality, to same extent as a private entity, is not immune from suit for tortious construction or maintenance of sewers), a distinction which is not applicable to state agencies such as WSSC, *see Maryland-National*, 521 A.2d at 733; *Prince George's County v. Blumberg*, 44 Md. App. 79, 407 A.2d 1151, 1177 (1979) (*Blumberg I*), *rev'd on other grounds*, 288 Md. 275, 418 A.2d 1155 (1980) (*Blumberg II*) (reversing for failure to exhaust administrative remedies). The rationale for permitting suits against WSSC is that the Maryland legislature has expressly waived WSSC's sovereign immunity.

[15] WSSC's waiver of sovereign immunity does not, however, subject it to suit for all of its actions. Rather, under the public duty doctrine, WSSC may not be held liable for negligent acts or omissions in the enactment or enforcement of regulations. *But cf. Blumberg II*, 418 A.2d at 1166-67 (administrative remedies may be pursued against WSSC on claims of wrongful issuance or revocation of permits). The public duty doctrine is based on the premise that

> "Absent statutory intention to the contrary, the duty to enforce statutory law is a duty owed to the public generally, the breach of which is not actionable on behalf of the private person suffering damage."

Willow Tree Learning Ctr. Inc. v. Prince George's County, 85 Md.App. 508, 584 A.2d 157, 161 (1991) (quoting *Duranv. City of Tucson*, 20 Ariz.App. 22, 509 P.2d 1059, 1063 (1973)). WSSC argues that the "public duty doctrine" exempts it from liability to Westfarm for negligence.

[16] WSSC had no common law duty to Westfarm to enact or enforce regulations which might have prevented IFI from putting PCE or other dangerous chemicals into the sewer. *Cf. E. Eyring & Sons Co. v. City of Baltimore*, 253 Md. 380,

252 A.2d 824, 825-26 (1969) (no common law duty to enact or enforce building codes to protect the personal or property interests of individuals). Similarly, WSSC's existing regulations did not " 'set forth mandatory acts clearly for the protection of a *particular class* of persons rather than the public as a whole,' " and therefore did not create a statutory duty from WSSC to Westfarm. *See Ashburn v. Anne Arundel County*, 306 Md. 617, 510 A.2d 1078, 1087 (1986) (standard for finding duty created by statute) (citations omitted). However, where a governmental body's conduct is a common law tort, it cannot claim immunity from suit by relying on the fact that, simultaneously, it was failing to enforce the law. *See Quelvog v. City of Long Beach*, 6 Cal.App.3d 584, 86 Cal.Rptr. 127, 132 (1970). And the mere existence of a statute which relates to similar injuries but does not give rise to a statutory duty does not preclude the existence of a common law duty. *Eisel*, 597 A.2d at 454 (finding that existence of statute concerning student suicide did not give rise to a statutorily-based duty on the part of school counselors, but neither did the absence of a statutory duty preclude a common law duty). Thus, the public duty doctrine does not preclude the exisence of a common law duty from WSSC to Westfarm to exercise due care in the construction, maintenance, and operation of the sewer.

[17, 18] The district court properly so held: The court appropriately directed Westfarm, on WSSC's pretrial motion *in limine*, not to argue that WSSC failed to enact or enforce regulations,[10] and properly instructed the jury that WSSC could

[10]Westfarm did allude to an improper, "public duty" theory in closing argument. However, "juries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987). An isolated allusion in closing argument, followed by the proper instructions given by the district court, could not have prejudiced WSSC, and therefore cannot form the basis for reversal here. Fed.R.Civ.P. 61.

be found negligent, not for a breach of its public duties of enacting and enforcing regulations, and not for a breach of any particular regulation, but rather for a breach of its common law duties "to construct the Tech Road sewer in a workmanlike manner and inspect, maintain, and properly operate that sewer."[11]

b. *Admission of Evidence.* WSSC argues that Westfarm was permitted to present evidence to the jury to substantiate a theory of negligence in enactment and enforcement of regulation, contrary to the public duty doctrine, WSSC points to evidence presentedby Westfarm that WSSC took no action to require IFI to comply with WSSC's regulations, that WSSC failed to require IFI to obtain a discharge authorization permit, and that WSSC failed to monitor IFI's discharges to ensure that they were in compliance with the regulations.

[19, 20] However, the evidence pointed to by WSSC was all relevant and admissible to show foreseeability of the presence of contaminants in the sewer system, and such foreseeability relates to two elements of common law negligence: duty and proximate causation. Foreseeability of contaminants is necessary not to show that WSSC had a duty

---

[11]WSSC's brief criticizes the district court for refusing to instruct the jury specifically on the public duty doctrine. However, the district court did not abuse its discretion in determining that such an instruction was unnecessary, particularly in light of the voluminous instructions already given in the case, and the potential for a public duty doctrine instruction to mislead the jury into believing that the public duty doctrine would apply to any actions taken by WSSC to address a harm which could have been addressed by enacting or enforcing regulations instead. *See Hardin v. Ski Venture,* 50 F.3d 1291, 1293-94 (4th Cir. 1995) ("District courts are necessarily vested with a great deal of discretion in constructing the specific form and content of jury instructions . . . . So long as the charge is accurate on the law and does not confuse or mislead the jury, it is not erroneous." (citations omitted)).

to exercise its power to enforce or enact regulations, but to show that WSSC's common law duty to exercise due care in the construction and maintenance of its sewer foreseeably would be breached by failure to take reasonable action in response to the contaminants. The fact that the foreseeability of the presence of contaminants was proved in part by WSSC's failure to enforce its own regulations does not allow WSSC to escape liability for negligence; as the Federal Rules of Evidence implicitly recognize, a piece of evidence may be admitted though it is inadmissible for one purpose, where it is admissible for another. *See* Fed.R.Evid. 105 ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.")[12] The district court did not abuse its discretion in admitting the evidence.

c. *Common Law Duty.* Under Maryland law, the following factors must be considered in determining whether a tort duty should be recognized:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to ex-

[12]Although WSSC might have been entitled, upon a request pursuant to Federal Rule of Evidence 105, to a jury instruction that the evidence was to be used to determine foreseeability but not public duty, the failure to give such a limiting instruction does not constitute reversible error where, as here, one was never requested. *See United States v. Mark*, 943 F.2d 444, 449 (4th Cir.1991).

> ercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Eisel, 597 A.2d at 452 (citations and internal quotation marks omitted). WSSC argues that we should not recognize a duty from WSSC to Westfarm to construct, maintain, and operate sewers with due care, on the basis that two of the factors—foreseeability and the extent of the burden to the defendant—weigh against finding a duty.

Turning to the first, and most important element of the duty calculus under Maryland law, *see Eisel*, 597 A.2d at 452, foreseeability, we note that Maryland courts further the familiar social policy of limitation of liability for, unforeseeable consequences which was announced in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928): " 'The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.' " *Hartford Ins.*, 642 A.2d at 226 (quoting *Palsgraf*, 162 N.E. at 100). Maryland courts have long recognized that flooding damage is a type of risk which sewer operators should reasonably perceive from negligently constructed, maintained, or operated pipes which leak or burst. *See, e.g., Katz*, 397 A.2d at 1028; *True*, 76 A.2d at 136. Thus the question we now must answer is whether the risk of PCE entering and injuring an adjacent landowner's land is of a type of risk which would reasonably have been foreseen at the time WSSC engaged in the allegedly negligent conduct of failing to construct, maintain, and operate its Tech Road sewer with due care. *See Henley v. Prince George's County*, 305 Md. 320, 503 A.2d 1333, 1341 (1986) (foreseeability factor requires "prospective consideration of the facts existing at the time of the negligent conduct.").

[21] WSSC disavows liability for negligent construction of the sewer because in 1968, when the sewer was built, it was unforeseeable that Westfarm or other landowners would be hurt by WSSC's faulty construction-work. Of course, in 1968, it was unforeseeable that IFI would open a laboratory in 1974 and put PCE in the sewer, or that PCE would harm the land it entered.

However, Westfarm's claim was for negligent construction, maintenance, and operation of the sewer, not a discrete claim for negligent construction. Although WSSC may not have been negligent when the sewer was constructed originally, the construction of the sewer became negligent over time as it began to crack and the dangers of leaky sewers became known. WSSC knew from its 1977 sewer survey that the Tech Road sewer contained cracks requring repair; a reasonable person would have perceived that cracks lead to leaks. WSSC was given notice of the dangers to groundwater from leaky sewers in 1979, when WSSC hired environmental consultants to help it respond to the Clean Water Act, which was passed, in part, to respond to the dangers of leaky sewers. WSSC's own employee, Michael Armorer, admitted that WSSC was aware as far back as 1974 that IFI disposed small amounts chemicals into the sewer. WSSC's own regulations permitted the discharge of toxic organics such as PCE in limited concentrations, and WSSC knew IFI used PCE. Even though IFI did not report discharges of PCE, WSSC permitted PCE discharges, WSSC knew IFI used PCE, and WSSC knew that no sampling had ever been performed to test whether IFI discharged PCE. Thus, WSSC should reasonably have perceived some risk that groundwater contaminants such as PCE were being released into the sewer.

Once WSSC knew or should have known of the leaks, the dangers to groundwater of toxic organics, and the risk that groundwater contaminants were being released, it reasonably

should have perceived that its original construction of the sewer, and its subsequent failure to inspect and repair the sewer, could cause groundwater contamination to neighboring land. Because Westfarm was clearly within the class of landowners whose land foreseeably would have been harmed by WSSC's negligence, WSSC owed Westfarm a duty to reconstruct, maintain and operate the sewer in a manner reasonably calculated to avoid the harm.

[22] Although WSSC claims that "every toilet, sink, shower and bath" will become a potential source of liability to WSSC—and thus that the extent of the burden to WSSC weighs against imposing a duty—we note that the scope of WSSC's duty is limited by ordinary principles of negligence. As Maryland Courts have recognized, " '[a]s the duty owed varies with circumstances and with the relation to each other of the individuals concerned, so the alleged negligence varies,' " *Hartford Ins.*, 642 A.2d at 226 (quoting *West Virginia Cent. & Pittsburgh Ry. v. Fuller*, 96 Md. 652, 54 A. 669, 671 (1903)), and a governmental entity "does not insure its citizens against damage from works of its construction, and is only liable as other proprietors for negligence or willful misconduct," *Hanrahan v. Mayor of Baltimore*, 114 Md. 517, 80 A. 312, 318 (1911). WSSC argues that because Westfarm admitted that all sewers leak—because water can pass through a solid wall of concrete to a small extent—all sewer operators will be held liable. The duty to exercise reasonable care, however, does not require a leakproof sewer system, only a sewer which does not leak unreasonably due to being constructed, maintained, and operated without due care. Moreover, the scope of the duty reasonably to prevent leaks will vary with the reasonable expectation of what materials foreseeably might find their way into the sewer; the reasonable construction, maintenance, and repair of a sewer carrying only "toilet, sink, shower and bath" household waste might differ from the

reasonable construction, maintenance, and repair of a sewer carrying dangerous industrial chemicals.[13]

2. *Sufficiency of Evidence of Proximate Cause.*

To be held liable for negligence, the defendant's breach of duty must have been the proximate cause of the alleged injury. As Maryland courts have explained:

> Proximate cause ultimately involves a conclusion that someone will be held legally responsible for the consequences of an act or omission. This determination is subject to considerations of fairness or social policy as well as mere causation. Thus, although an injury might not have occurred "but for" an antecedent act of the defendant, liability may not be imposed if for example the negligence of one person is merely passive and potential, while the negligence of another is the moving and effective cause of the injury . . . or if the injury is so remote in time and space from defendant's original negligence and another's negligence intervenes.

Peterson v. Underwood, 258 Md. 9, 264 A.2d 851, 855 (1970) (citations omitted).

[23, 24] Proximate cause will not be found when a third party's negligent conduct is an independent intervening cause of

---

[13]WSSC also asserts that, as a matter of law, insufficient evidence was introduced to show negligence, because no expert testified to the scope of WSSC's duties, and because a sewer operator's duties are the type of specialized duties which are beyond the ken of a layperson. We need not decide whether the scope of a sewer operator's duties is beyond the ken of a juror, however, because a review of the record reveals that Westfarm did present expert testimony from a witness, George Frigon, on the issue. Frigon testified as to the proper construction of a sewer manhole, the proper position of an "O-ring" in a maintained sewer, and other sewer construction and maintenance practices which retard leaking.

the injury. *Hartford Ins.*, 642 A.2d at 229. Yet two defendants may be found jointly liable if each is a proximate cause of the injury. *E.g, Atlantic Mut. Ins. Co. v. Kenney*, 323 Md. 116, 591 A.2d 507, 513 (1991); *cf. True*, 76 A.2d at 136 ("The fact that a property owner's land is flooded because of an extraordinary rainfall does not relieve the municipality from liability, where such rainfall would not have caused the damage in the absence of the clogging up or stoppage of the sewer, caused by the negligence of that municipality.") (citations omitted). The key to determining whether a third party's negligent conduct is a supervening cause or merely a contributing cause is foreseeability:

> [T]he liablity of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not.

Atlantic Mut., 591 A.2d at 514 (quoting *State v. Hecht Co.*, 165 Md. 415, 169 A. 311, 313 (1933)). Proximate cause may be found even where the conduct of the third party is tortious or criminal, so long as the conduct was facilitated by the first party and reasonably foreseeable, and some ultimate harm was reasonably foreseeable. *Scott v. Watson*, 278 Md. 160, 359 A.2d 548, 556 (1976).

WSSC contends that insufficient evidence was presented to find that it was the proximate cause of Westfarm's injury; indeed, it contends that IFI was an independent intervening superseding cause. WSSC contends that its actions were too passive and remote to be deemed a proximate cause, because IFI's placement of PCE in the sewer system, which at times exceeded the concentration levels of WSSC's regulations, was unforseeable to WSSC.

[25] Viewing the evidence in the light most favorable to the nonmovant, however, sufficient evidence existed for a reasonable jury to determine, as it did, that WSSC's negligence was a proximate cause of Westfarm's injury. Although once WSSC built its sewer system, it apparently did become quite "passive" in its actions regarding operation and maintenance of the sewer, this passivity was negligent in and of itself because WSSC knew that the sewer contained cracks and should have known that the sewer needed maintenance. WSSC knew that IFI used PCE, knew that IFI discharged other hazardous chemicals, and knew that IFI's waste stream had never been monitored for TTOs. WSSC's regulations permitted the discharge of certain concentrations of PCEs such as TTOs.

Under the test for foreseeability established by the Maryland Court of Appeals, "looking back from the harm to the actor's negligent conduct [to determine whether] it appears to the court highly extraordinary that [the conduct] should have brought about the harm," *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 624 A.2d 496, 500 (1993) (citation omitted), it does not seem "extraordinary" that the sewer would carry PCE and leak PCE into the groundwater and then into the adjoining land of Westfarm. A reasonable jury could have found, as it did, for the nonomvant, and therefore the district court's denial of WSSC's motion for a directed verdict was proper.

D. *Raising of Statutory Damage Cap Post-Judgment:*

Judgment was entered on the jury's verdict on August 4, 1993. On August 5, WSSC moved to amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure to reduce its liability on the neglegence judgment to $200,000 based upon the following provision in the Maryland LGTCA:

> The liability of a local government may not exceed $200,000 per an individual claim, and $500,000 per total

> claims that arise from the same occurrence for damages resulting from tortious acts or omissions. . . .

Md.Cts. & Jud.Proc.Code Ann. § 5-403(a). The liability cap was enacted on July 1, 1987, and is applicable prospectively only. *Surratt v. Prince George's County*, 320 Md. 439, 578 A.2d 745, 751 n. 5 (1990) As noted *supra*, although WSSC is a state agency, it is treated as a local government for purposes of the LGTCA, and therefore is entitled to the benefit of LGTCA provisions.

WSSC had never directly raised the cap as an issue prior to the entry of judgment. WSSC claims that it indirectly raised the statutory cap by pleading governmental immunity and by raising the notice provisions of the LGTCA. WSSC also claims that Westfarm knew about the cap, and therefore has shown no prejudice from any failure of WSSC to raise the cap prior to trial. We, like the district court, disagree: Raising the LGTCA's notice requirement does not effectively raise the issue of the LGTCA's damages cap; the two provisions of the LGTCA are different defenses. *Compare* Md.Cts. & Jud.Proc.Code Ann. § 5-403(a) *with id.* § 5-404(a). And while it is true that prior to WSSC's entry into this suit Westfarm indicated, in a motion opposing the addition of WSSC as a party, an awareness of the statutory cap, this awareness of the law did not put Westfarm on notice that WSSC would ever raise the defense.

More substantially, WSSC argues that the cap is a recapture of sovereign immunity, which is not waivable under Maryland law. As the Maryland Court of Appeals has explained, under Maryland law

> [i]t is of no moment that the matter of sovereign immunity was not raised below by the pleadings or otherwise . . . . "[T]he law is well established that counsel

> for the State or one of its agencies may not either by affirmative action or by failure to plead the defense, waive the defense of governmental immunity in the absence of express statutory authorization, or by necessary implication from a statute."

Board of Trustees of Howard Community College v. John K. Ruff, Inc., 278 Md.580, 366 A.2d 360, 362 (1976) (quoting *Board of Educ. v. Alcrymat Corp.*, 258 Md. 508, 266 A.2d 349, 353 (1970)). WSSC therefore asserts that any failure of WSSC to raise the cap prior to entry of judgment does not waive the cap.

The district court found that the cap is an affirmative defense, which therefore must be raised, according to Federal Rule of Civil Procedure 8(c), in the defendant's answer, unless the record indicates that the defense has been introduced without objection and tried by the "express or implied consent" of the parties, *see* Fed.R.Civ.P. 15(b). The district court found that because the defense had not been raised or tried by the parties, it was waived.

We review a district court's factual findings on a Rule 59(e) motion for abuse of discretion, *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990), but we review the district court's legal holdings *de novo*, *Taylor v. United States*, 821 F.2d 1428, 1430 n. 1 (9th Cir.1987) (*Taylor I*), *cert. denied*, 485 U.S. 992, 108 S.Ct. 1300, 99 L.Ed.2d 510 (1988) (White, J., dissenting from denial of certiorari) (*Taylor II*).

We first note that our sister circuits are split as to whether state or federal law controls the characterization of a state statutory liability cap when raised in federal court in connection with a state law claim,. Further, the circuits which hold tht federal law governs, are split as to how federal law characterizes a cap. As explained by Justice White in his

dissent from the denial of certiorari in *Taylor v. United States:*

> Under the accepted interpretation of Rule 8(c) of the Federal Rules of Civil Procedure, any matter "constituting an avoidance or affirmative defense" to the matters raised in the plaintiff's complaint must be pleaded in a timely manner or it is deemed to be waived. As a matter of California law, the state statute at issue in this case is understood to be an affirmative defense. The Ninth Circuit held, however, that this determination is not binding on a federal court because the proper characterization of the statute in this case, which was brought in federal court, is a matter of federal procedural law. The court ruled that this statute is a mere limitation of liability, rather than an avoidance or an affirmative defense. This conclusion conflicts with the decisions of two other Courts of Appeals. In *Ingraham v. United States*, 808 F.2d 1075, 1078-1079 (1987), the Fifth Circuit held that an identical statutory limitation on damages recoverable in the State of Texas is an affirmative defense that is wavied under the Federal Rules by failure to plead it in a timely manner. And in *Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1975), the First Circuit held that a statutory limitation on liability is an affirmative defense under Rule 8(c).

Taylor II, 485 U.S. at 992-93, 108 S.Ct. at 1301 (White, J., dissenting from denial of certiorari). More recently, the Tenth Circuit considered the issue of whether a state statutory cap on the liability of local governments could be raised in a post-trial motion. *Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600, 604-05 (10th Cir.1994). Without analyzing how the cap is treated under state law, the Tenth Circuit held that the cap was a waivable limit on liability rather than sovereign immunity. *Id.* at 694. The Tenth Circuit

held further that even if the cap were sovereign immunity, sovereign immunity is waived when not raised, as a matter of federal law. *Id.* at 604-05.

Thus we are presented with two questions undecided in the Fourth Circuit: (a) whether state or federal law governs the characterization of the cap; (b) if federal law governs, whether it characterizes the cap as (i) an affirmative defense, which is waived by a failure to raise it at a "pragmatically sufficient time," *Lucas v. United States*, 807 F.2d 414, 48 (5th Cir.1986), (ii) sovereign immunity, which is waived by failure to raise it, *see Bentley*, 41 F.3d at 604-05, or (iii) a limitation of liability, which is not waived by a failure to raise it, *see Taylor I*, 821 F.2d at 1433. Moreover, if we find that Maryland state law governs, we are led to a question undecided as a matter of Maryland state law; whether the cap is an affirmative defense, which is waived by a failure to raise it, or a recapture of sovereign immunity, which is not waived by a failure to raise it.

[26] We need not decide these thorny and undecided issues of federal and Maryland law, however, because a review of the record indicates that any error in failing to permit WSSC to raise the cap postjudgment was harmless. *See* Fed.R.Civ.P. 61; *O'Neal v. McAninch*, ____ U.S. ____, ____, 115 S.Ct. 992, 997,130 L.Ed.2d 947 (1995). Whether or not the cap is governed by state or federal law, and whether or not the governing law treats the cap as an affirmative defense, a reenactment of sovereign immunity or a limit of liability, only two outcomes are possible—WSSC's failure to raise the cap until after judgment either did or did not waive WSSC's right to an application of the cap. If the cap was waived, the district court committed no error. Yet even if the cap was not waived, no reversal is due here if the application of the cap would not have led to a different result.

[27] Reviewing the record, it is clear that the same damages

would have been awarded whether or not the statutory cap had been applied. The LGTCA liability cap applies only to " 'actions arising from events occurring on or after' [the LGTCA's] effect date, [July of 1987]." *Surratt*, 578 A.2d at 751 n. 5. All of the evidence presented to the jury indicates that the relevant events in this case—the leaking of PCE and WSSC's negligence—occurred both before and after July of 1987. Maryland courts have held that environmental property damage occurs not at the time of discovery of the property damage, but at the time "the discharge of contaminants into the soil and underlying groundwater is of sufficient gravity to [produce] detectable [damage]." *Harford County v. Harford Mut. Ins. Co.*, 327 Md. 418, 610 A.2d 286, 295 (1992). The only evidence presented to the jury on the common law damages issue was that Westfarm's property was diminished in value by the very presence of PCE; as soon a potential buyers learned of the presence of PCE, the buyers would not purchase the property. Because the evidence was undisputed that PCE leaked into the Westfarm property prior to 1987 and that the damages were created by the presence of PCE, the jury's verdict as to the amount of damages would not have changed if the statutory cap on post-1987 damages were to have been applied. Therefore we conclude that the district court's denial of WSSC's motion to amend the judgment is not reversible error.

III. CONCLUSION

For the foregoing reasons, we affirm in all respects. We emphasize that we express no opinion as to the wisdom of imposing CERCLA liability on POTWs or of waiving WSSC's immunity from common law tort claims. These questions are for the Congress and the Maryland legislature, respectively, to decide.

AFFIRMED.

APPENDIX B

WESTFARM ASSOCIATES LIMITED PARTNERSHIP

v.

INTERNATIONAL FABRICARE INSTITUTE

v.

WASHINGTON SUBURBAN SANITARY COMMISSION.

Civ.No. HM-92-9.

United States District Court,
D. Maryland.

Nov. 10, 1993.

Jeffrey M. Johnson, Dickstein, Shapiro & Morin, Washington, DC, for plaintiff.

Duane A. Siler, Deborah M. Lodge, Michael N. Romita, Patton, Boggs & Blow, Washington, DC, for defendant.

MEMORANDUM AND ORDER

HERBERT F. MURRAY, Senior District Judge.

Presently before the Court is the motion of defendant Washington Suburban Sanitary Commission ("WSSC") for Revision of Amount of Judgment in Conformance with the Local Government Tort Claims Act. Plaintiff Westfarm Associates

Limited Partnership ("Westfarm") and defendant International Fabricare Institute ("IFI") have opposed the motion and WSSC has replied. With these memoranda, the Court finds the motion is ready for disposition. No hearing is deemed necessary. Local Rule 105.6 (D.Md.1992).

I. *BACKGROUND*

The trial of this matter concluded on July 30, 1993, with the jury returning a verdict of $2.5 million against defendants IFI and WSSC. The Court entered judgment on the verdict on August 4, 1993. On August 5, 1993, WSSC filed the instant motion, which seeks an Order reducing WSSC's liability on the judgment to $200,000 based upon the Maryland Local Government Tort Claims Act ("LGTCA"), Md.Cts. & J.Proc. § 5-403(a). The LGTCA imposes a cap on the liability applicable to local governments. Specifically, § 5-403(a) provides:

> The lliability of a local government may not exceed $200,000 per an individual claim, and $500,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions, including liability arising under subsection (b) of this section and indemnification under subsection (c) of this section.

II. *DISCUSSION*

[1] The Court finds WSSC's attempt to assert the LGTCA as a defense at this stage of the proceedings is unavailing for several reasons.First, the Court agrees that WSSC's failure to plead the LGTCA as a defense in its answer or at any time before the trial concluded and judgment was entered amounted to a waiver. *See Jakobsen v. Mass. Port Authority,* 520 F.2d 810, 813 (1st Cir.1975).[1]

---

[1]Although WSSC asserted in the Pretrial Order that Westfarm's claims were barred by the LGTCA's notice provisions, WSSC did not raise the

Fed.R.Civ.P. 8(c) requires that the defendant include in its answer certain enumerated defenses and "any other matter constituting an avoidance or affirmative defense." In *Jakobsen*, the court determined that the Massachusetts version of the LGTCA imposing a limitation on the Port Authority's liability, while not included among the defenses listed in Rule 8(c), nevertheless fell within the Rule's residuary clause and amounted to an affirmative defense. 520 F.2d at 813; *see also Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir.1987) (Texas' statutory limit on medical malpractice damages is an affirmative defense which must be pleaded timely or is waived); *Simon v. United States*, 891 F.2d 1154, 1156 (5th Cir.1990) (failure to affirmatively plead Louisiana Medical Malpractice Act resulted in waiver of that defense). The *Jakobsen* court held that the Port Authority's failure to plead the statute as an affirmative defense and its belated assertion of the defense in a motion for a directed verdict amounted to a waiver. 520 F.2d at 813.

[2, 3] This court holds that the LGTCA is an avoidance which WSSC was required to plead affirmatively. See *Jakob-*

LGTCA as a defense to limit its liability. Moreover, WSSC did not raise the defense by pleading the "governmental immunity doctrine" in its answer. Although the Court of Appeals of Maryland has held that the WSSC is a state agency and therefore immune from tort liability by § 1-3 of the Washington Suburban Sanitary District Code, the General Assembly waived that immunity "with respect to tort actions." *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 397 A.2d 1027, 1032 (1979); *Prince George's County v. Blumberg*, 44 Md.App.79, 407 A.2d 1151, 1177 (1979), *rev'd on other grounds*, 288 Md. 275, 418 A.2d 1155 (1980). Though the WSSC is included among the agencies defined as a "local government" for purposes of the LGTCA, *see* Md.Cts. & J.Proc. § 5-401(d)(7), the LGTCA bears no relationship to WSSC's immunity or the waiver of that immunity pursuant to Md.Ann.Code Art. 29, § 1-201 (1990). Accordingly, WSSC did not raise the issue of the LGTCA by pleading the governmental immunity doctrine in its answer.

sen, 520 F.2d at 813; *Ingraham*, 808 F.2d at 1079 (limitation on liability is an "avoidance" within the intendment of Rule 8(c)'s residuary clause). Generally, the failure to plead an affirmative defense results in the waiver of that defense and its exclusion as an issue in the case. 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1278 (1990). This rule, however, is not automatically applied. If the record indicates the defense has been introduced without objection, Fed.R.Civ.P. 15(b) requires that the pleadings be treated as if they had actually raised the issue. But if the unpleaded affirmative defense has not been tried by the "express or implied consent" of the parties, the pleadings will not be so construed. *Id.*

[4] In the instant case, the record dicloses that WSSC did not raise the LGTCA's cap on liability when it filed its answer to IFI's third-party complaint on February 17, 1993, or when it filed its answer to Westfarm's complaint on July 13, 1993. The Court agrees that if WSSC intended to rely on the LGTCA as a defense, Westfarm and IFI were entitled to notice of that intention when WSSC filed its answer or at a time sufficiently early to permit Westfarm and IFI an opportunity to address the defense. *See* Wright & Miller, § 1278; *Canal Ins. Co. v. Earnshaw*, 629 F.Supp. 114, 119 (D.Kan.1985) (defense under state Automobile Injury Reparations Act waived where defendant failed to assert the Act in its answer or pretrial order); *compare Lucas v. United States*, 807 F.2d 414, 418 (5th Cir.1986) (failure to plead affirmative defense did not result in waiver where defense was raised at trial at a "pragmatically sufficient time" and plaintiffs were not prejudiced). At no time before or during the trial of this action did WSSC raise any issue relating to the LGTCA, either through a pretrial motion, trial motion, witness, argument of counsel, or jury instruction. Although, as noted above, WSSC alluded to the LGTCA when it asserted in the pretrial order that Westfarm's

claims were barred by the LGTCA's notice provisions, WSSC never claimed that its liability in this action was limited based upon the LGTCA's damages cap. Therefore, the Court finds WSSC's reference in the pretrial order to the LGTCA's notice provisions and insufficient basis for holding that the issue of the cap was before the Court when this action was tried. *See Jakobsen*, 520 F.2d at 813; *Earnshaw*, 629 F.Supp. at 119.

Westfarm and IFI further argue that they would be prejudiced if WSSC was permitted to assert the cap at this late date, contending that had they known WSSC would seek to rely upon the LGTCA's cap, their pledings could have been amended to allege multiple occurrences and their discovery and trial presentations planned to address the issue. In particular, the parties could have focused on the number of occurrences and the extent of damages attributable to WSSC's negligence prior to July 1, 1987, the effective date of the LGTCA.

The Court agrees that these are valid considerations where, as here, the applicability of the cap would require the resolution of numerous factual issues relating to damages prior to the statute's effective date and the specific damage to each of the six separate parcels of Westfarm's property. *See Lucas*, 807 F.2d at 418 (government's failure to plead statutory cap on malpractice damages did not waive defense where applicability of the cap was "purely a legal issue" upon which the court could pass without need for factual proof); *Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir.1987), *cert. denied*, 485 U.S. 992, 108 S.Ct. 1300, 99 L.Ed.2d 510 (1988) (government's delay in asserting California statute limiting recovery for noneconomic damages until filing posttrial motion did not result in waiver where application of the statute required no additional factual inquiry).

III. *CONCLUSION*

For the foregoing reasons, the Court finds WSSC's failure to plead the LGTCA's damages cap in its answer or to raise it at any time until after the trial concluded waived that defense and it will not now be considered by the Court.

Accordingly, it is this 10th day of November, 1993, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant Washington Suburban Sanitary Commission's Motion for Revision of Amount of Judgment be, and the same hereby is, *Denied;* and

(2) that the Clerk of the Court shall mail a copy of this Memorandum and Order to the parties.

APPENDIX C

WESTFARM ASSOCIATES LIMITED PARTNERSHIP

v.

INTERNATIONAL FABRICARE INSTITUTE

v.

WASHINGTON SUBURBAN SANITARY COMMISSION

Civil No. HM-92-9

Oct. 22, 1993

MEMORANDUM AND ORDER

Presently before the Court is the motion of defendant Washington Suburban Sanitary Commission ("WSSC") for reconsideration of this Court's July 16, 1993 Memorandum and Order granting the motion for partial summary judgment of plaintiff Westfarm Associates Limited Partnership ("Westfarm") against WSSC. Westfarm and defendant International Fabricare Institute ("IFI") have opposed the motion and WSSC has replied. With these memoranda, the Court finds the motion is ready for disposition.No hearing is deemed necessary, Local Rule 105.6 (D.Md. 1992).

WSSC's motion is predicated upon the following claims: (1) the Court neglected to consider the issue of material fact created by the affidavit of Dr. Ram; (2) the Court incorrectly assumed that WSSC designed the Tech Road sewer to exfiltrate; (3) there was a dispute of fact as to the cracks in the sewer; (4) the Court failed to consider the illegal nature of

IFI's discharges; and (5) the Court should not have held WSSC liable under CERCLA for the cleanup costs for the Allegany parcel.

To merit relief by way of a motion for reconsideration, this Court has held that the "motion must be timely and premised on a meritorious defense, an absence of prejudice to the opposing party, and exceptional circumstances. *F.D.I.C. v. Heidrick*, 812 F.Supp 586, 588 (D. Md. 1991) citing *Smith v. Bounds*, 813 F.2d 1299 (4th Cir. 1987). Although WSSC's motion is timely and Westfarm and IFI have suffered no prejudice, the Court finds no merit to any of the reasons WSSC has advanced in support of its motion. The Court will therefore not depart from or amend any of the rulings in its July 16, 1993 Memorandum and Order.

Accordingly, it is this 22nd day of October, 1993 by the United States District Court for the District of Maryland,

ORDERED:

(1) that WSSC's Motion for Reconsideration of this Court's July 19, 1993 Memorandum and Order be, and the same hereby is, *Denied;* and

(2) that the Clerk of the Court shall mail a copy of this Memorandum and Order to the parties.

/s/ Herbert F. Murray
Senior United States District Judge

APPENDIX D

WESTFARM ASSOCIATES LIMITED PARTNERSHIP

v.

INTERNATIONAL FABRICARE INSTITUTE, et al.

v.

The WASHINGTON SUBURBAN SANITARY COMMISSION.

No. HM-92-9.
United States District Court,
D. Maryland.

July 16, 1993.

Jeffrey M. Johnson, Dickstein, Shapiro & Morin, Washington, DC, for plaintiff.

Duane A. Siler, Deborah M. Lodge, Michael N. Romita, Patton, Boggs & Blow, Washington, DC, for defendant.

MEMORANDUM

HERBERT F. MURRAY, Senior District Judge.

After discovering a hazardous substance in groundwater under its land, the plaintiff, Westfarm Associates L.P. ("Westfarm"), brought this action against the defendant, the International Fabricare Institute ("IFI"). Subsequently, both Westfarm and IFI asserted claims against the Washington Suburban Sanitary Commission ("WSSC"). At two hearings held in open Court, this Court entertained argument from all three parties on a variety of pending motions. Having considered the oral and written arguments of counsel, this Court today will resolve the four pending motions for summary judgment.

I. *STATEMENT OF THE CASE*

The standards governing the consideration of motions for summary judgment are well known and need not be reiterated in this opinion. *See Weyerhaeuser Corp. v. Koppers Co., Inc.*, 771 F.Supp. 1406, 1409-10 (D.Md. 1991).

Westfarm owns a number of adjacent parcels of land in Montgomery County, Maryland. Groundwater testing under three of those parcels ("Parcel A," "Allegany," and "Somerset") has revealed concentrations of tetrachloroethylene (also known as perchloroethylene, perc, or "PCE"), a solvent used by IFI in its dry cleaning operations.

IFI occupies land at 12251 Tech Road (the "Tech Road site"), immediately to the northwest of Parcel A; Allegany and Somerset lie to the south-southeast of Parcel A. Both IFI's property and Parcel A abut Tech Road, beneath which runs a sewer line owned and operated by WSSC (the "Tech Road Sewer"). Beginning near the northwest corner of IFI's land, Tech Road runs southeast along IFI's property and Parcel A, then turns to the southwest. Information gathered from monitoring wells in the area indicates that the groundwater under these parcels flows generally to the southeast.

As the nationwide trade association for commercial dry cleaners and launderers, IFI uses PCE in several of the dry cleaning and related operations conducted on its property. Different operations generate different kinds of PCE waste, and IFI employees over the years disposed of those wastes in different ways. First, since 1969 the ordinary dry cleaning operations of IFI or its predecessor, the National Institute of Dry Cleaning, have generated drained spent cartridge filters, "cooked" filter residues, and still residues. Until 1985, IFI disposed of spent filters and cooked filter residue in a dumpster at the Tech Road site, and poured the PCE-laden still residues down the drain. Secondly, the operation of certain

solvent recycling equipment and air pollution control equipment has generated so-called "separator water" — liquid containing PCE dissolved in solution. Until 1990, IFI poured its separator water down the drain. Finally, in its research laboratory IFI performs various tests on samples of PCE sent to IFI by its members and others. Until 1992, IFI poured PCE down the drain after completing each of the tests. IFI knows of no use of PCE on its land prior to 1969.

PCE, water, and other liquids poured down the drain at IFI flow through a lateral pipe ("sewer lateral") underground in a straight line to the Tech Road Sewer. As noted above, the groundwater in the area flows generally to the southeast. A video-tape examination of the sewer lateral revealed many cracks in its interior. Groundwater slightly southeast of the sewer lateral contains high concentrations of PCE, while groundwater just north of the sewer lateral contains no PCE.

WSSC is an agency of the State of Maryland, created in 1918 and charged with the responsibility for providing water and sewer services to the residents of Montgomery and Prince George's Counties in Maryland. The Tech Road Sewer is part of a network of approximately 4000 miles of sewer pipes owned and operated by WSSC.

IFI's sewer lateral empties into the Tech Road Sewer at a sewer house connection at the sewer's terminal end. The house connection extends 27 feet toward IFI's land, where it links with the sewer lateral. Wastes from the sewer lateral enter the sewer house connection and then flow inside the Tech Road Sewer underneath Tech Road, first to the southeast and then to the southwest.

When it commissioned construction of the Tech Road Sewer in 1969, WSSC called for a design that would allow leakage from the pipe at a rate of 200 gallons per inch diameter, per mile, per day. Additionally, a video-tape examination of the

Tech Road Sewer revealed cracks in the interior of the pipe. Testing of sediment in the sewer house connection of the Tech Road Sewer revealed concentrations of PCE over 100,000 parts per billion — the highest concentration of PCE found at any of the testing sites in the area.

As a governmental agency, WSSC regulates the discharge of industrial waste into its sewer system. Since the first set of regulations, WSSC has prohibited discharges of "[a]ny noxious or malodorous . . . substance . . . capable of creating a public nuisance of hazard to life. . .." 1972 WSSC Regulations § 701.3.4; *see also* 1983 WSSC Regulations § 702.1 (same language). Most recently, WSSC amended that regulatory language to prohibit discharges of "malodorous or toxic . . . substances that . . . are capable of creating a public nuisance or hazard to human health or the environment. . . ." 1992 WSSC Regulations § 906.c. Also, beginning in 1983, WSSC imposed limits on discharges of "toxic organics" into the sewers. WSSC recently increased the limit on such discharges to 2.13 milligrams per liter (mg/l), up from its 1983 level of 0.58 mg/l. 1992 WSSC Regulations, Table 9.1.

Westfarm filed this action in 1992 for relief available under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"), as well as for relief under certain state law claims. After this Court ruled on the motion of IFI to dismiss, *see Westfarm Assoc. L.P. v. International Fabricare Inst.*, 22 Envt'l L.Rep. (Envt'l L.Inst.) 21,350, 1992 WL 315188 (D.Md. May 6, 1992), Westfarm filed its amended complaint, adding claims regarding the contamination of Allegany and Somerset. Later, IFI filed a third-party complaint against WSSC seeking contribution and indemnification, and Westfarm filed a second amended complaint adding WSSC as a defendant.

Presently pending before this Court are the following four motions: the motion of Westfarm for partial summary judgment on Counts I and III of the second amended complaint against IFI;[1] the motion of WSSC for summary judgment against Westfarm; the motion of WSSC for summary judgment against IFI; and the motion of Westfarm for partial summary judgment on Count I of the second amended complaint against WSSC. Tracking the claims asserted in the second amended complaint, this Court will address the issues raised in those motions.

[1] Preliminarily, a procedural issue raised by IFI requires brief attention. Emphasizing that Westfarm filed the second amended complaint after filing the motion for partial summary judgment against it, IFI argues that this Court should deny the motion as moot. However, Counts I and III of the second amended complaint remain substantially the same between the first and second amended complaints (as they relate to IFI), and no prejudice follows from reqiring IFI to respond to the pending motion. Accordingly, this Court will not require the plaintiff to refile its motion against IFI.

II. *COUNT I – CERCLA*

In Count I, Westfarm seeks relief under CERCLA. With respect to its motion for partial summary judgment, Westfarm seeks a declaratory judgment regarding the liability of IFI and WSSC for its response costs, leaving the calculation of the amount of recoverable costs for trial. Naturally, the defendants dispute CERCLA liability on several grounds, and WSSC seeks summary judgment on this issue.

[1]Count I seeks relief under § 107 of CERCLA, 42 U.S.C. § 9607, and Count III seeks relief under § 7002 of RCRA, 42 U.S.C. § 6972. Westfarm has abandoned Count II, which sought relief under § 310 of CERCLA, 42 U.S.C. § 9659. Counts IV through VII assert state law claims for negligence, trespass, nuisance, and strict liability, respectively.

[2,3] Congress enacted CERCLA in part to encourage the cleanup of environmental hazards by private individuals, who then may recover the costs of the cleanup from the parties responsible for the hazard. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 996 F.2d 837, 839 (4th Cir.1992). Essentially a "remedial statute designed by Congress to protect and preserve public health and the environment," CERCLA requires this Court "to construe its provisions liberally to avoid frustration of the beneficial legislative purposes." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.* 805 F.2d 1074, 1081 (1st Cir.1986). As part of its remedial scheme, CERCLA imposes strict liability on responsible parties. *United States v. Monsanto Co.*, 858 F.2d 160, 167 & n. 11 (4th Cir.1988).

[4] Westfarm asserts its claims for response costs pursuant to § 107 of CERCLA, 42 U.S.C. § 9607.[2] In order to recover

---

[2]Section 107 provides as follows:

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned and operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

* * * * * *

footnote continued on next page

under that section, a plaintiff must show that (1) a release or a threatened release[3] of a hazardous substance (2) from a facility[4] (3) required it to incur response costs necessary

---

(B) any . . . necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

* * * * * *

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishs by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all the relevant facts and circumstances, and (b) he took precautions against forseeable act or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607.

[3]Section 101(22) of CERCLA provides:

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . .

42 U.S.C. § 9601(22). Section 101(8) of CERCLA provides:

The term "environment" means . . . (B) any . . . surface water, ground water, drinking water supply, land surface of subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

42 U.S.C. § 9601(8).

[4]Section 101(9) of CERCLA provides:

The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

and consistent with the national contingency plan ("NCP").[5] Lastly, the defendant must be a 'potentially responsible person,' *i.e.*, it must fall within the scope of at least one of the four subparagraphs of § 107(a). *Weyerhaeuser*, 771 F.Supp. at 1410; *accord White v. Count of Newberry*, 985 F.2d 168, 172 (4th Cir.1993). All of the parties agree that PCE is a hazadous substance under CERCLA.[6]

In opposition to the plaintiff's motion, both defendants argue that Westfarm has failed to demonstrate several of the elements listed above, or that genuine issues of material fact preclude summary judgment. Additionally, WSSC asserts the affirmative innocent landowner defense. This Court now will turn to a discussion of those arguments.

A. *Facility*

IFI concedes that the Tech Road site is a facility under CERCLA. In contrast, WSSC argues that Congress intended to shield municipal sewer authorities from potentially enormous liability under CERCLA by excluding publicly owned treatment works ("POTWs") from the statutory definition of facility.

In particular, focusing the parenthetical phrase in the definition of "facility" — "including any pipe into a sewer or publicly owned treatment works" — WSSC first notes that such pipes would be included in the ordinary meaning of "pipe or pipeline." WSSC argues that, by adding the parenthetical phrase, Congress must have intended to include every sort of pipe or pipeline *except* sewers and POTWs.

---

[5]Authorized by § 105 of CERCLA, 42 U.S.C. § 9605, the NCP is set forth at 40 C.F.R. Part 300.

[6]For a more thorough discussion of the hazards of PCE, *see International Fabricare Inst. v. United States EPA*, 972 F.2d 384, 395-98 (D.C.Cir.1992) (affirming EPA regulation of PCE as a human carcinogen).

That argument repeats an argument raised in an earlier motion filed by WSSC, and in an earlier opinion, this Court rejected such a narrow construction of the term "facility." *Westfarm Assoc. L.P. v. International Fabricare Inst.*, Civ. No. HM-92-9, slip op. at 4-9 (Jul. 6, 1993). *Accord 3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1360 n. 10 (9th Cir.1990); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n. 15 (2nd Cir. 1985); *HRW Systems, Inc. v. Washington Gas Light Co.*, 823 F.Supp. 318, 338 (D.Md.1993).

B. *Release*

In its motion papers, Westfarm proposes a number of PCE wastestreams from the Tech Road site to the environment. Those wastestreams include cracks and joints in the sewer lateral and the Tech Road Sewer, leaks in the dumpster, and cracks in the floor at the Tech Road site. In response, IFI argues that Westfarm has failed to demonstrate conclusively that PCE escaped from the Tech Road site. Additionally, WSSC argues that leakage of PCE from the Tech Road Sewer could not constitute a "release" from the facility within the scope of CERCLA. This Court will consider these arguments in turn.

[5] In particular, IFI disputes the evidence of cracks in the sewer lateral. IFI Opposition at 4-5 ("the videotape evidence is insufficient to support an inference that any of the cracks go all the way through the exterior of the pipe"). Additionally, IFI disputes that PCE could have leached from the dumpster. *Id.*, Aff of William E. Fisher, ¶ *8* ("To the best of my knowledge, no dumpster located on IFI's property has ever leaked PCE . . ."). Finally, IFI disputes that PCE could have seeped through the floor. *Id.* ¶ 12 ("To the best of my knowledge, no liquid from any PCE spill has ever made its way through the floor . . ."). IFI maintains that these disputed facts preclude summary judgment.

Preliminarily, this Court notes that IFI does not argue that the PCE presently contaminating the ground water beneath Westfarm's property originated anywhere other than the Tech Road site. Instead, IFI argues that Westfarm has failed to pinpoint how and when that PCE arrived in the groundwater.

This Court has heard such arguments before from CERCLA defendants. The plaintiff in *Weyerhaeuser* produced evidence that only the defendant used the hazardous substances found on the property at issue in that case, and also that those substances did not migrate to the property from elsewhere. The defendant countered, arguing that the plaintiff made "no showing as to how or when any release of . . . hazardous substances occurred, and without this specific showing [the plaintiff] has not met its burden of proof with regard to the issue of release." *Weyerhaeuser*, 771 F.Sup. at 1411. The defendant also produced deposition testimony from employees who swore that, to their knowledge, none of the chemicals had leaked into the ground. *See id.* at 1411 n. 4. Holding in the context of a summary judgment motion that a release occurred, this Court rejected the attempt to create factual issues with general denials. *Id.* at 1412-13.

Similarly, in the case at bar, this Court rejects IFI's attempt to raise issues of fact with regard to how and when PCE entered the environment. Undisputed soil and groundwater tests show concentrations of PCE slightly downgradient from the sewer lateral and in the area where the dumpster formerly stood. Mere conjecture that cracks evident in the interior of the sewer lateral might not have allowed PCE to escape, or that, to the knowledge of one IFI employee, PCE never leaked from the dumpster, simply do not create factual issues that require trial. PCE was released from the Tech Road site.

[6] WSSC also argues that Westfarm has failed to demonstrate a release of PCE from the Tech Road Sewer.

Because the PCE at issue in this case all originated at the Tech Road site, WSSC argues, the only "release" for CERCLA purposes occurred when IFI poured PCE wastes down the drain. Extending CERCLA liaiblity to a passive third party simply because a hazardous substance travels through its property, WSSC concludes, would expand the reach of the statute impermissibly.

[7] However, the case law generally contradicts the argument made by WSSC. Indeed, the Fourth Circuit recently adopted a construction of the term "disposal" that does not require any participation by potentially responsible persons. *Nurad,* 996 F.2d at 844-46. Because the definition of "release" includes disposal, *see* § 101(22) of CERCLA 42 U.S.C. § 9601(22), the breadth of the later term translates directly to the former. Accordingly, a "release" under CERCLA does not require active participation by any responsible parties. Finally, because WSSC presents no evidence that PCE did not escape from the Tech Road Sewer into the surrounding environment — indeed, as noted above, the interior of the Tech Road Sewer has many cracks and WSSC intended it to leak — this Court concludes that a release of PCE occurred from the Tech Road Sewer.[7]

C. *Response Costs*

Although the calculation of the recoverable amount of response costs is reserved for trial, in the context of the pre-

[7]At one point in its papers, WSSC argues that Westfarm has failed to demonstrate that PCE from IFI reached the Tech Road Sewer from the sewer lateral, *see* WSSC Opposition at 10, or that PCE inside the Tech Road Sewer did not come from some other source. *Id.* at 11. However, the extraordinarily high concentration of PCE in the sewer house connection supports Westfarm's position, and WSSC presents no evidence at all to explain those test results. In the absence of conflicting evidence, this Court takes as established that PCE from IFI travelled through the sewer lateral into the Tech Road Sewer.

sent motion Westfarm must demonstrate that at least some of its response costs were necessary and consistent with the NCP. *Weyerhaeuser*, 771 F.Supp. at 1414. Both IFI and WSSC dispute that Westfarm has satisfied that burden.

[8] In particular, IFI argues that Westfarm's response costs were not necessary in light of the contents of a letter from the Maryland Department of the Environment ("MDE") dated June 28, 1991, informing Westfarm that MDE would investigate the contamination and require appropriate action. Because MDE would require appropriate action, IFI argues, the plaintiff unnecessarily has expended costs investigating the source and extent of the contamination. As of this writing, however, two years have passed since that letter and the parties have not indicated to this Court that MDE has required any action of any kind with regard to the groundwater contamination in this case. In any event, state approval is not required for a plaintiff to recover response costs. *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 901 F.2d 1206, 1208 (4th Cir.1990).

[9] Additionally, although the defendants do not argue that the plaintiff investigated the contamination excessively, IFI and WSSC argue that the failure to solicit public comment as required by the NCP, *see* 40 C.F.R. § 300.700(c)(3)(i), before conducting its investigation precludes any recovery of those costs. This Court previously has permitted a plaintiff to recover its investigatory costs under CERCLA. *Weyerhaeuser*, 771 F.Supp. at 1414-15; *see also Gache v. Town of Harrison*, 813 F.Supp. 1037, 1046 (S.D.N.Y.1993) ("Courts have held that initial preliminary investigatory and monitoring costs are recoverable irrespective of the recoverability of other response costs or compliance with the requirements of the [NCP]"). In accordance with that precedent, this Court finds no merit in the defendants' public comment argument.

D. *Causation*

In support of its own motions and in opposition to the plaintiff's motion, WSSC argues that Westfarm has failed to demonstrate that any release of PCE from the Tech Road Sewer caused the incurrence of any response costs. In particular, the case at bar involves two sites — the Tech Road Sewer and the groundwater underneath Westfarm's land — and therefore, WSSC argues, Westfarm must demonstrate that PCE migrated from one site to the other. Without such proof, WSSC concludes, the plaintiff cannot satisfy the element of causation.

[10] CERCLA does not require Westfarm to prove the element of causation. *Monsanto*, 858 F.2d at 170 n. 17 ("The legislature thus eliminated the element of causation from the plaintiff's liability case") (citing discussion of legislative history in *Shore Realty*, 759 F.2d at 1044). Under § 107(a) of CERCLA, 42 U.S.C. § 9607(a), liability is subject only to the defenses in § 107(b) of CERCLA, 42 U.S.C. § 9607(b), each of which requires the defendant affirmatively to prove the absence of causation. *Monsanto*, 858 F.2d at 170; *see also id.* ("In deleting causation language from section 107(a), we assume as have many other courts that Congress knew of the synergistic and migratory capabilities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source").

[11] Although it allocates the burden of disproving causation to the defendant, CERCLA uses the word "causes":

> [any person, linked in any one of several specified ways, to a facility], from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . .

§ 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4). That language imposes liability for releases, and *also* imposes liability for threatened releases that cause the incurrence of response costs. Therefore, only in the case of threatened releases does it appear that a plaintiff must demonstrate any degree of causation. *City of New York v. Exxon Corp.*, 766 F.Supp. 177, 193 (S.D.N.Y.1991) ("better reading of this phrase is that only a threatened release must cause response costs").

[12] In the case at bar, which involves actual releases and not merely threatened releases, the plaintiff has proven that the hazardous substance from the facility is identical to the hazardous substance presently contaminating the groundwater beneath its land. As a potentially responsible person, WSSC bears the burden of disproving the element of causation, through one of the available defenses listed in § 107(b) of CERCLA, 42 U.S.C. § 9607(b).

Addressing WSSC's argument in passing; even if CERCLA required causation in this case, it does not follow that the plaintiff must demonstrate that PCE from the Tech Road Sewer has contaminated the groundwater under its land. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1154 (1st Cir.1989) ("There is nothing in the statute, its legislative history, or the case law, which requires proof that the defendant's hazardous wastes actually have migrated to plaintiff's property, causing contamination of plaintiff's property, before CERCLA liaiblity is triggered"). Rejecting the defense asserted by WSSC in another "two-site" case, the United States District Court for the District of Delaware noted that:

> the policies underlying section 107 conflict with [the defendant's] demand that [the plaintiff] prove beyond dispute that the contaminants found near [the defendant's land] actually flow from [the defendant's land]. From a technological standpoint, [the plaintiff's] ability to "fingerprint" the

> leachate in the groundwater as emanating from either [the defendant's land] or [another source of contamination] is exceedingly doubtful. To impose such a requirement might permit the owners and operators of both facilities to avoid financial responsibility for the cleanup, and would thus eviscerate section 107.

Artesian Water Co. v. New Castle County, 659 F.Supp. 1269, 1282 (D.Del.1987), *aff'd* 851 F.2d 643 (3rd Cir.1988).

In another two-site case, the district court adopted the reasoning now submitted to this Court by WSSC; on appeal, however, the United States Court of Appeals for the First Circuit vacated and remanded that decision. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.* 689 F.Supp. 1223 (D.Mass.1988), *rev'd*, 889 F.2d 1146 (1st Cir.1989) Criticizing the arguments that WSSC now asserts, the appellate court in *Dedham Water Co.* observed that, "[t]o our knowledge, every court that has addressed this issue, with the exception of the district court in the instant case, has held that it is not necessary to prove actual contamination of plaintiff's property by defendant's waste in order to establish liability under CERCLA." 889 F.2d at 1154.

In *Artesian Water Co.* and *Dedham Water Co.*, both courts held that CERCLA requires a causal link between a release or a threatened release and response costs, expressly rejecting the argument made by WSSC in this case. As noted above, the Fourth Circuit in *Monsanto* rejected the notion that the language of CERCLA requires Westfarm to demonstrate causation at all. Although this Court has noted that CERCLA apparently requires proof of causation in cases of threatened releases, the case at bar involves actual releases of PCE, and so the holding of the Fourth Circuit in *Monsanto* controls.

E. *Innocent Landowner Defense*

[13,14] In its papers, WSSC seeks the protection of § 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). That section "sets forth a limited affirmative defense based on the complete absence of causation." *Monsanto*, 858 F.2d at 168. Westfarm disputes that WSSC has satisfied the elements of that defense.

Preliminarily, this Court notes that WSSC — not IFI — designed the Tech Road Sewer to leak. Additionally, IFI did not put the cracks in the interior of the Tech Road Sewer, and WSSC — not IFI — neglected to repair them. Finally, WSSC's representative conceded at his deposition that WSSC expected small industrial customers — like IFI — to pour hazardous substances such as PCE into the sewer. Although the WSSC regulations ban discharges of "malodorous or toxic . . . substance," those same regulations allow discharges of toxic organics and other hazardous chemicals.

Moreover, WSSC has failed to demonstrate that PCE from the Tech Road Sewer did not migrate to the groundwater, or that all fo the PCE presently contaminating the groundwater underneath Westfarm's land flowed there from IFI's facility. Based on the evidence of record, construed in the light most favorable to WSSC, this Court cannot concludes that releases of PCE from the Tech Road site caused all of the groundwater contamination at issue, or that WSSC exercised due care with respect to the hazardous substance concerned in light of all of the relevant facts and circumstances, or that WSSC took precautions against the foreseeable acts or omissions of industrial customers like IFI or the foreseeable consequences of those acts or omissions. Without evidence to support its innocent landowner defense, WSSC cannot avoid its liability for response costs under CERCLA.[8]

[8]Because WSSC has failed to satisfy any of the other elements of the defense in § 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), this Court need not reach the issue of whether IFI poured PCE into the Tech Road Sewer "in connection with a contractual relationship."

F. *Contribution*

[15,16] Although CERCLA does not mandate the imposition of joint and several liaiblity on responsible parties, such liability is allowed in appropriate cases. *Monsanto*, 858 F.2d at 171. Indeed, joint and several liability will control in this case unless the defendants can carry their burden of demonstrating either the existence of distinct ernvironmental harms or a reasonable basis for determining the contribution of each defendant to that harm. *Weyerhaeuser*, 771 F.Supp. at 1416.

[17] As noted above, IFI has filed a third party complaint against WSSC, seeking contribution under § 113(f) of CERCLA, 42 U.S.C. § 9613(f). Asserting "unclean hands," WSSC argues that IFI may not seek contribution.

[18-20] In actions for contribution under CERCLA, this Court has broad discretion to apply a wide variety of factors in order to reach an equitable resolution. *See United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571-72 (6th Cir.1991) ("the court may consider any factor it deems in the interest of justice in allocating conribution recovery"). In a given action for contribution, therefore, the district court may consider the traditional equitable defenses: *caveat emptor*, estoppel, laches, unclean hand, *et cetera*. *United States v. Fairchild Indus., Inc.*, 766 F.Supp. 405, 414 (D.Md.1991) (declining to strike equitable defenses at an early stage of the case, the court was "reluctant to in any way limit its ability to deal effectively with the problem at hand by eliminating or circumscribing its equitable jurisdiction").[9] Nevertheless, in the

[9]Parenthetically, to the extent that the decision in *Fairchild Indus.* approved the assertion of equitable defenses in an action brought by the government, that holding appears contrary to the majority of the case law. *See United States v. Davis*, 794 F.Supp. 67, 71 (D.R.I.1992) (citing cases).

context of CERCLA, those doctrines are not defenses to liaiblity but are merely factors for the court to consider. *See Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89-90. (3rd Cir.1988). ("under CERCLA the doctrine of caveat emptor is not a defense to liability for contribution but may only be considered in mitigation of amount due"). Consequently, the doctrine of unclean hands does not shield WSSC from liability for contribution under CERCLA.

G. *Conclusion*

The foregoing discussion makes it clear that both IFI and WSSC are liable to Westfarm for the costs of responding to the PCE contamination, under § 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)4)(B). Having resolved all of the motions with respect to Count I of the second amended complaint, this Court will examine the issues in connection with Count III.

III. *COUNT III – RCRA*

Under Count III, Westfarm seeks a declaratory judgment and injunctive relief against IFI in connection with alleged violations of the requirements of RCRA, under § 7002(a) of RCRA, 42 U.S.C. § 6972(a).[10] Specifically, Westfarm seeks a declar-

[10]Section 7002(a) provides that

> any person may commence a civil action on his own behalf—
>
> (1)(A) against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
>
> (B) against any person, including . . . any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .
>
> The district court shall have jurisdiction, without regard to the amount

footnote continued on next page

atory judgment regarding alleged violations by IFI of applicable regulations and an injunction enjoining IFI both to comply with those regulations and to formulate and execute cleanup efforts at the Tech Road Site. IFI has abandoned its third party claim against WSSC under RCRA; consequently, the following discussion does not implicate WSSC.

In contrast to CERCLA, which addresses the cleanup of hazardous substances released into the environment, RCRA establishes a program for the management of hazardous waste from its origin to its ultimate disposal (so-called "cradle to grave" regulation) to ensure that the means of disposal of hazardous waste will prevent escape of those wastes into the environment, and provides an enforcement mechanism to ensure compliance with that program. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 783 (4th Cir.1991). Section 3006 of RCRA, 42 U.S.C. § 6926, allows the states to develop hazardous waste programs at least as stringent as RCRA, subject to authorization by the Administrator of the EPA. After receiving authorization, the state may implement its hazardous waste program "in lieu of the Federal program." Section 3006(b) of RCRA, 42 U.S.C. § 6926(b). Maryland has received final authorization for its hazardous waste program. *See* 50 Fed.Reg. 3511 (Jan. 25, 1985).

Westfarm alleges that IFI has violated and continues to violate two types of regulations under Maryland's hazardous

---

in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, . . . and to apply any appropriate civil penalties under sction 6928(a) and (g) of this title.

42 U.S.C. § 6972(a).

waste program: first, regulations of generators of hazardous waste, COMAR 26.13.03, and second, regulations of owners and operators of hazardous waste treatment, storage, and disposal ("TSD") facilities. COMAR 26.13.05. IFI argues first, that the domestic sewage exemption takes it outside the scope of the regulations; second, that the Tech Road site is not a TSD facility; and finally, even assuming that IFI violated those regulations, this Court cannot order it to clean up its land absent a threat of endangerment to health or the environment. This Court will address each of those arguments in turn.

A. *Domestic Sewage Exemption*

[21] The Maryland hazardous waste program places restrictions on generators of hazardous wastes. *See* COMAR 26.13.03. IFI first argues that the PCE contaminating the groundwater under Westfarm's land is not "hazardous waste" within the meaning of the Maryland regulations. In particular, IFI argues that the PCE that its employees poured down the drain is domestic sewage not subject to regulations.

Although the Maryland regulations broadly define "solid waste,"[11] the regulations exclude domestic sewage, defined as untreated sanitary wastes passing through a sewer system to a publicly-owned treatment works. COMAR 26.13.02.04A(1). As such, Maryland's exemption is narrower than the comparable federal regulation, which excludes "*[a]ny mixture* of domestic sewage *and other wastes* that passes through a sewer system to a publicly owned treatment works for treatment." 40 C.F.R. § 261.4(a)(1)(ii) (emphasis added).

---

[11]Under the Maryland hazardous waste program, "solid waste" includes any discarded material, COMAR 26.13.02.02A, which in turn includes material that has been "disposed of." COMAR 26.13.02.02B(1). As noted in more detail above, IFI "disposed of" PCE at the Tech Road site.

Because the Maryland program controls, and because, as an industrial entity, IFI does not produce "domestic sewage," *see Comite pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180, 181-82 (1st Cir.1989), this Court concludes that the domestic sewage exemption does not apply to the PCE that IFI poured down the drain at the Tech Road site.

B. *TSD Facility*

[22] Westfarm asserts that because the Tech Road site is a TSD facility, IFI must comply with the applicable regulations in the Maryland hazardous waste program pertaining to such facilities. In opposition to those assertions, IFI argues that the Tech Road site was neither a disposal facility nor a treatment facility.

As noted above, the Maryland regulations broadly define the term "disposal" to include both active and passive human activity. However, those same regulations define a "disposal facility" narrowly as "a facility or part of a facility at which hazardous waste is ***intentionally*** placed into or on any land or water, and at which waste will remain after closure." COMAR 26.13.01.03B(16) (emphasis added). IFI argues that it never intentionally placed PCE in the soil or groundwater at the Tech Road site,and the plaintiff has failed to submit evidence to support an inference to the contrary. Although IFI admittedly poured PCE wastes down the drain and placed PCE wastes in its dumpster, this Court cannot conclude that IFI *intended* the PCE to leak into the ground or groundwater at the Tech Road site or to remain there indefinitely. As a result, this Court cannot conclude that IFI is the owner and operator of a disposal facility under the Maryland hazardous waste program.

[23] In contrast, IFI admittedly accepted samples of PCE

from outside sources and subjected those samples to testing and treatment within the meaning of the Maryland hazardous waste program. However, IFI argues, the treatment of those samples occurred in an enclosed environment—a "steam sparger" used to separate PCE from filters—and therefore falls within an exception for a "totall enclosed treatment facility." COMAR 26.13.01.03B(81), 26.13.05.01A(3)(f).

The exception for a totally enclosed treatment facility requires that such a facility be "directly connected to an industrial production process." COMAR 26.13.01.03B(81). In the case at bar, however, the steam sparger was not directly connected to the industrial process that generated the PCE treated within it. 55 Fed.Reg. 25454,25467 (June 21, 1990) ("Treatment facilities located off the site of generation are not directly connected to an industrial process. Thus, commercial waste treatment facilities . . . such as solvent reclamation facilities, by definition ordinarily would not be totally enclosed"). Accordingly, IFI's steam sparger was not a totallly enclosed treatment facility within the scope of the Maryland hazardous waste program.[12]

C. *Conclusion*

The foregoing discussion demonstrates that IFI violated the applicable regulations of the Maryland hazardous waste program. Westfarm therefore is entitled to judgment under § 7002(a)(1)(A) of RCRA, 42 U.S.C. § 6972(a)(1)(A), and this Court will enjoin IFI to comply with those regulations.

---

[12]In addition to the Maryland regulations that govern treatment facilities, Westfarm asserts that IFI has violated Maryland regulations that govern generators of hazardous waste. In its opposition to Westfarm's motion for partial summary judgment against it, IFI has not raised any arguments in opposition to that latter claim.

However, Westfarm also has requested that this Court enter an injunction enjoining IFI to clean up its land. Such relief would be available under § 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), upon a showing that IFI contributed to the handling, storage, treatment, transportation, or disposal of PCE, thus presenting an imminent and substantial endangerment to health or the environment. At this stage of the proceedings, Westfarm has never attempted to make any such showing, and therefore no such order will issue.

IV. *STATE LAW CLAIMS*

In Counts IV, V, VI, and VII Westfarm asserts claims against IFI and WSSC under state law theories of negligence, trespass, nuisance, and strict liability.[13] Additionally, IFI seeks contribution and indemnity from WSSC under state law. In the context of the pending motions, however, only WSSC seeks summary judgment as to these claims, against both Westfarm and IFI. This Court now will consider the merits of those motions.

A. *Negligence*

[24] The parties all agree that Maryland law applies to the state law claims asserted in this case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73, 58 S.Ct. 817, 819, 82 L.Ed. 1188 (1938). In support of its motion for summary judgment on the claim of negligence, WSSC argues first, that it owed no duty of care to Westfarm or IFI; second, that it had no notice of any defective condition in the Tech Road Sewer; and third, that the evidence of record compels a conclusion that IFI was the sole proximate cause of all of the groundwater contamination.

---

[13]Specifically, Westfarm asserts all of those claims against IFI and all but strict liability against WSSC.

[25] However, according to the treatise relied upon by WSSC:

> municipalities are generally liable for negligence in the construction or failure to repair sewers and drains. Municipal liability for negligence in failure to repair is generally the same, in extent, as for negligence in the construction of sewers, or in the failure to keep sewers free from obstructions. Liability may arise when the municipality had actual or constructive notice of the existence of an obstruction and fails to act.

McQuillen, Municipal Corporations § 53.125, at 237 (footnotes omitted) (citing *True v. Mayor & Comm'rs of Westernport*, 196 Md. 280, 76 A.2d 135 (1950); *Hanrahan v. City of Baltimore*, 114 Md. 517, 80 A. 312 (1911); *Mayor & Comm'rs of Frostburg v. Duffy*, 70 Md. 47, 16 A. 642 (1889); *Hitchins v. Town of Frostburg*, 68 Md. 100, 11 A. 826 (1887)). Accordingly, WSSC had a duty to exercise reasonable care in the construction and maintenance of the Tech Road Sewer. Moreover, to the extent that reasonable inspection would have revealed the cracks in the Tech Road Sewer, WSSC had constructive notice of those defects. The evidence in this record does not establish beyond question that WSSC satisfied that standard of care.

The evidence also fails to demonstrate that IFI was the sole cause of all of the contamination in the area of the Tech Road Sewer.The expert testimony on that issue differs, and the groundwater testing results in evidence indicate slightly higher concentrations of PCE near Somerset, farther away from IFI but closer to the bend in the Tech Road Sewer. In the context of these genuine issues of material fact, this Court cannot grant summary judgment in favor of WSSC on the issue of negligence.

B. *Trespass*

[26] IFI does not assert a claim of trespass against WSSC, but instead seeks contribution and indemnification from WSSC for trespasses on the property of the plaintiff. Althugh WSSC again argues tht IFI was the sole proximate cause of the contamination of that land, as noted above, the evidence presently in the record in this case is less than compeling. Accordingy, genuine issues of material fact preclude this Court from granting summary judgment in favor of WSSC on the issue of trespass.

C. *Nuisance*

[27, 28] In Maryland, "[a] municipality, in establishing drains and sewers, is subject to liability if it so constructed and maintained them as to create a private nuisance, so as to injure another in the use and enjoyment of his property." *Livezey v. Bel Air*, 174 Md. 568, 577, 199 A. 838 (1938). In support of its motion for summary judgment, WSSC argues that it cannot be held liable for failing to abate a nuisance caused by another party.

However, Westfarm asserts that PCE migrating into the groundwater from the Tech Road site constituted a nuisance, and also that PCE migrating into the groundwater from the Tech Road Sewer constituted a nuisance. Because Westfarm does not seek to hold WSSC liable for the disposal of PCE from the Tech Road site, but instead only for the discharge of PCE from the Tech Road Sewer, over which WSSC had control, summary judgment on the issue of nuisance will be denied.

D. *Strict Liability*

The last common law claim asserted in the second amended complaint is for strict liability for abnormally dangerous activities. *See Yommer v. McKenzie,* 255 Md. 220,224, 257 A.2d 138 (1969) (recognizing cause of action under § 520 of the Restatement (Second) of Torts). In its third party complaint, IFI seeks contribution and indemnification from WSSC on that claim.

[29] In support of its motion, WSSC argues that the operation of a sewer system is not an abnormally dangerous activity within the scope of § 520. Although IFI disputes it, that defendant has cited no case to contradict WSSC's contention. Applying the test adopted by the court in *Yommer,* this Court agrees with WSSC.

The defendant in *Yommer* kept an underground storage tank for gasoline, the contents of which leaked into a nearby well used for drinking water. Given the high risk of harm and the inappropriateness of placing such a tank in close proximity to a family well, the court in *Yommer* concluded that keeping such a tank was an abnormally dangerous activity. In this case, in contrast, maintaining a sewer system is a highly appropriate use of the land beneath Tech Road, and does not involve the collection and storage of large quantities of material in a certain place.

E. *Contribution and Indemnification*

[30, 31] Although it raises no arguments against the claim for contribution asserted by IFI, WSSC argues that IFI may not recover indemnification. In Maryland, one tortfeasor may receive indemnifiction from another tortfeasor "where his own conduct, although negligent, is considered to be pasive or secondary." *Pyramid Condominium Ass'n v. Morgan,* 606

F.Supp. 592, 595 (D.Md.1985).

In the case at bar, the evidence demonstrates that PCE was released into the environment from the Tech Road site and from the Tech Road Sewer. No negligence on the part of WSSC, either active or passive, could be said to have contributed to releases from the Tech Road site; indeed, presuming that the factfinder ultimately finds both IFI and WSSC negligent, to the extent that all of the PCE within the Tech Road Sewer originated at IFI's facility, only willful blindness could lead the factfinder to conclude that the negligence of WSSC was more active than the negligence of IFI. Accordingly, this case does not present a situation where indemnification between the parties would be proper.

V. *CONCLUSION*

The conclusions reached during the course of the above discussion can be summarized briefly. With regard to Count I, this Court holds that both IFI and WSSC are potentially responsible parties under CERCLA, and that WSSC may not avail itself of the innocent landowner defense in § 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), and this Court will enter a declaratory judgment to that effect. With regard to Count III, this Court holds that IFI has violated the provisions of the Maryland hazardous waste program implemented pursuant to § 3006 of RCRA, 42 U.S.C. § 6926, and this Court will enjoin IFI to comply with those regulations. With regard to the several claims brought pursuant to Maryland state law, this Court holds that genuine issues of material fact preclude granting summary judgment in favor of WSSC. Finally, with respect to IFI's claim of strict liability against WSSC and for indemnification from WSSC under state law, this Court will grant summary judgment in favor of WSSC.

This Court will execute an Order in accordance with the foregoing Memorandum.

ORDER

In accordance with the Memorandum issued on this date in the above-captioned case, it is this 16 day of July, 1993, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the motion of the plaintiff, Westfarm Associates Limited Partnership, for partial summary judgment against the International Fabricare Institute be, and the same hereby is, *Granted;*

(2) tht the motion of the plaintiff for partial summary judgment against the Washington Suburban Sanitary Commission be, and the same hereby is, *Granted;*

(3) that the International Fabricare Institute and Washington Suburban Sanitary Commission be, and the same hereby are, *Declared* to be liable to the plaintiff, Westfarm Associates Limited Partnership under § 107(a) of CERCLA, 42 U.S.C. § 9607(a), for any and all costs that the plaintif has incurred or will incur in responding to PCE contamination of the parcels of land designated as Parcei A, Allegany, and Somerset, to the extent that such costs were or are necessary and consistent with the National Contingency Plan;

(4) that the International Fabricare Institute be, and the same hereby is, *Directed* to comply with those provisions of the Maryland hazardous waste program applicable to generators of hazardous waste and to owners and operators of hazardous waste treatment, storage and disposal facilities.

(5) that the motion of the defendant/third party defendant, Washington Suburban Sanitary Commission, for summary judgment against Westfarm Associates Limited Partnership be, and the same hereby is, *Denied;*

(6) that the motion of the defendant/third party defendant for summary judgment against International Fabricare Institute be, and the same hereby is, *Granted in Part and Denied in Part;*

(7) that the third party complaint be, and the same hereby is, *Dismissed* to the extent it asserts a claim for strict liability or for indemnification against Washington Suburban Sanitary Commission; and

(8) that the Clerk of the Court shall mail a copy of this Order to Magistrate Judge Catherine C. Blake and to all of the parties.

APPENDIX E

United States Environmental Protection Agency | Office of Municipal Pollution Control (WH-546) Washington DC 20460 | February 1985 EPA 430/9-84-011

EPA

1984 Needs Survey Report to Congress

Assessment of Needed Publicly Owned Wastewater Treatment Facilities in the United States

TABLE C-1

NUMBER OF OPERATIONAL TREATMENT PLANTS AND COLLECTION SYSTEMS IN 1984

	Treatment Plants	Collection Systems
Alabama	231	271
Alaska	44	51
Arizona	118	134
Arkansas	290	313
California	583	763
Colorado	283	333
Connecticut	102	137
Delaware	21	35
Dist. of Columbia	1	1
Florida	263	330
Georgia	381	485
Hawaii	29	34
Idaho	149	164
Illinois	720	959
Indiana	357	397
Iowa	685	713
Kansas	566	576
Kentucky	225	271
Louisiana	312	335
Maine	98	159
Maryland	145	195
Massachusetts	112	202
Michigan	372	604
Minnesota	510	632
Mississippi	307	332
Missouri	538	583
Montana	160	164
Nebraska	452	516
Nevada	52	54
New Hampshire	72	95
New Jersey	224	498
New Mexico	102	112
New York	467	848
North Carolina	496	574
North Dakota	283	285
Ohio	689	855
Oklahoma	497	511
Oregon	206	242
Pennsylvania	664	1,245
Rhode Island	20	31
South Carolina	226	286
South Dakota	268	271
Tennessee	234	258
Texas	1,268	1,518
Utah	95	152
Vermont	90	99
Virginia	238	318
Washington	244	306
West Virginia	157	218
Wisconsin	570	707
Wyoming	108	115
AmericanSamoa	2	2
Guam	7	7
Mariana Islands	2	2
Puerto Rico	33	33
Trust Territories	6	6
Virgin Islands	4	4
TOTAL	15,378	19,341

TABLE C-2

NUMBER OF OPERATIONAL TREATMENT PLANTS AND COLLECTION SYSTEMS WHEN ALL IDENTIFIED YEAR 2000 NEEDS ARE MET

	Treatment Plants	Collection Systems
Alabama	336	416
Alaska	57	60
Arizona	175	197
Arkansas	482	534
California	902	1,157
Colorado	294	353
Connecticut	107	168
Delaware	22	42
Dist. of Columbia	1	1
Florida	336	493
Georgia	432	597
Hawaii	43	54
Idaho	198	222
Illinois	849	1,146
Indiana	501	582
Iowa	802	844
Kansas	581	606
Kentucky	388	459
Louisiana	447	518
Maine	207	244
Maryland	250	345
Massachusetts	150	267
Michigan	477	805
Minnesota	575	720
Mississippi	480	574
Missouri	638	736
Montana	181	186
Nebraska	465	530
Nevada	73	80
New Hampshire	141	179
New Jersey	146	545
New Mexico	142	155
New York	877	1,494
North Carolina	634	809
North Dakota	299	303
Ohio	775	1,091
Oklahoma	587	618
Oregon	226	277
Pennsylvania	1,169	1,994
Rhode Island	25	39
South Carolina	294	413
South Dakota	284	286
Tennessee	299	373
Texas	2,094	2,409
Utah	183	261
Vermont	99	113
Virginia	310	484
Washington	335	439
West Virginia	502	615
Wisconsin	620	822
Wyoming	113	128
American Samoa	2	2
Guam	6	6
Mariana Islands	3	3
Puerto Rico	32	34
Trust Territories	21	21
Virgin Islands	4	4
TOTAL	20,671	26,853

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

No. 95-1007

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

WASHINGTON SUBURBAN SANITARY COMMISSION,

Petitioner,

V.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Timothy A. Vanderver, Jr.
Counsel of Record
Duane A. Siler
Ruth L. Ramsey
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Counsel for Respondent International Fabricare Institute

28 pp

QUESTIONS PRESENTED

1. Whether migration of a hazardous substance from its original source of discharge through adjoining properties constitutes a "release" for which liability triggers under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

2. Whether the leaking of a hazardous substance by passive migration through the cracks and joints in a publicly-owned sewer system constitutes a "release" from a "facility" rendering the sewer system liable under CERCLA, 42 U.S.C. § 9607(a) when the hazardous substance was originally released into the sewer system by an industrial user of the system.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS TO DENY THE WRIT 7

I. The Petition Raises No Important or Novel Issues 7

A. The Decisions Below Do Not Conflict With *Lincoln Properties v. Higgins* 8

B. Municipal Liability Under CERCLA Has Been Repeatedly Recognized 11

C. Municipalities Have No Special Status Under CERCLA 13

II. There is No Disagreement Among Courts of Appeals Regarding WSSC's "Single Release" Theory 15

A. WSSC Cites No Applicable Support For Its "Single Release" Theory 17

B. If There Was Only One "Release," It Was From WSSC's Sewer 20

CONCLUSION 22

Table of Authorities

Cases	Pages(s)
B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992)	12, 13
Braxton v. U.S., 500 U.S. 344, 111 S. Ct. 1854, 114 L.Ed.2d 385 (1991)	15
Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg. Ltd., No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992)	16, 18
Cadillac Fairview/California, Inc. v. Dow Chem. Co., 21 Env't. Rep. Cas. 1108 (BNA 1984)	16, 17
Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989)	16, 17
Ecodyne Corp. v. Shah, 718 F. Supp. 1454 (N.D. Cal. 1989)	16, 17
Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992)	8, 9, 10, 20, 21
New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)	17
Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 121 L.Ed.2d 288	16, 17
O'Brien v. Brown, 409 U.S. 1, 92 S. Ct. 2718, 34 L.Ed.2d 1 (1972)	7

Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989) 11

Rhodes v. County of Darlington, S. Carolina, 833 F. Supp. 1163 (D. S.C. 1992) 12

Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991) 16, 17

State of New Jersey v. Gloucester Env. Mgt. Serv., 821 F. Supp. 999 (D. N.J. 1993) 12

Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) 14, 16, 17

Times Film Corp. v. Chicago, 365 U.S. 43 (1960) 7

Transportation Leasing Co. v. The State of California, 861 F. Supp 931 (C.D. Cal. 1993) 12

United States v. Petersen Sand and Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992) 16, 17, 18

Vermont v. Staco, Inc., 684 F. Supp. 822 (D.Vt. 1988) 16, 19

Statutes, Rules & Regulations

S. Ct. R. 10 ..... 7, 15

Comprehensive Environmental Response, Compensation and Liability Act,

42 U.S.C. § 9601 *et seq* ..... *passim*

42 U.S.C. § 9601(9) 5, 20
42 U.S.C. § 9601(22) 3, 4, 11, 16, 20
42 U.S.C. § 9601(8) 4, 21
42 U.S.C. § 9607(a) 2, 6
42 U.S.C. § 9607(a)(1) 11, 17, 18
42 U.S.C. § 9607(a)(2) 11, 17, 18
42 U.S.C. § 9607(a)(3) 11
42 U.S.C. § 107 13
42 U.S.C. § 113(j) 13

Other Authorities

Robert M. Frye, Note, *Municipal Sewer Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute*, 14 Stan. Envtl. L.J. 61 (Jan. 1995) 13

No. 95-1007

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

WASHINGTON SUBURBAN SANITARY COMMISSION,

Petitioner,

V.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondent, International Fabricare Institute ("IFI"), respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Fourth Circuit's opinion below. That opinion is reported at 66 F.3d 669 (4th Cir. 1995) and is reprinted in the petition for certiorari at Appendix A.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of "release," "environment," and "facility" as those terms are used in CERCLA.

Section 9607(a) of CERCLA states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned and operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessel or sites selected by such person, from which there is a

> release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Section 9601(22) states:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer or such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or

> special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory commission under section 170 of such Act [42 U.S.C.A. § 2010], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

"Environment," as used in § 9601(22), is defined by 42 U.S.C. § 9601(8) as:

> (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

A "facility" is defined as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment,

> ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

STATEMENT OF THE CASE

Respondent International Fabricare Institute ("IFI"), a trade association of dry cleaners, has its international headquarters in Silver Spring, Maryland. IFI's facility includes, among other things, a laboratory and various types of dry cleaning equipment used in research activities. From the inception of IFI's operations at this location in 1974 until 1992, small amounts of tetrachloroethylene ("PCE"), an organic solvent widely using in the dry cleaning industry, were discharged from IFI's laboratory and certain dry cleaning machines into a sanitary sewer line, known as the Tech Road sewer, owned and operated by Petitioner Washington Suburban Sanitary Commission ("WSSC"). IFI received a permit in 1974 to connect its facility to the Tech Road sewer line, which WSSC had constructed several years earlier, in 1968. Prior to beginning operations at this location, IFI notified WSSC of the quantities and types of chemicals, including several hazardous substances, that would be discharged by the facility into the sewer system.

On January 2, 1992, Respondent Westfarm Associates Limited Partnership ("Westfarm"), a property developer in the Washington, D.C. metropolitan area, sued IFI for response costs under the Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"), 42 U.S.C. § 9607(a). Westfarm initiated its suit against IFI as a result of an environmental audit conducted in 1991 in connection with the proposed sale of a parcel of Westfarm's property. The environmental audit revealed the presence of PCE in the groundwater beneath the property. Westfarm was able to identify IFI's property as a potential source of the PCE contamination.

In January 1993, WSSC became a party to the suit when the court granted IFI's motion to file a complaint against WSSC as a third party. IFI's complaint against WSSC asserted claims under Maryland common law as well as under CERCLA. Westfarm subsequently amended its complaint to include WSSC as a defendant.

Westfarm and IFI asserted claims against WSSC due to leaking pipes in the Tech Road sewer which allowed PCE to escape into the environment. In 1977, WSSC conducted a survey of its sewer system and found that there had been excessive infiltration into the Tech Road sewer -- leakage of groundwater or surface waters into the sewer line when seasonal groundwater tables were high enough to reach the line -- as to which corrective action was not taken. Additionally, WSSC was aware, as early as 1974, that IFI disposed of chemicals and hazardous substances into the sewer system. WSSC failed to regulate the quantity of hazardous substances which could be introduced into the sewer system, although after 1983 it did regulate the concentration of these substances.

In July 1993, the District Court found IFI and WSSC jointly and severally liable, pursuant to CERCLA, for the remediation of the PCE contamination. Subsequently, a jury awarded damages to Westfarm against IFI and WSSC, jointly and severally. WSSC now seeks review of the District Court's holding pursuant to CERCLA, but not of the

jury's award of damages. WSSC alleges that it should not be liable under CERCLA because PCE "migrated" from IFI's property through IFI's sewer line and into the Tech Road sewer, whence it leaked into subsurface soils and groundwater and moved onto Westfarm's property. Because of what WSSC terms the "passive migration" of PCE through its sewer lines, WSSC claims that it should not be liable. WSSC further argues that CERCLA requires a "release" from a "facility," and that only one release is possible -- the initial release from IFI's laboratory. WSSC's arguments on these issues were rejected by both the District Court and the Court of Appeals.

REASONS TO DENY THE WRIT

I. The Petition Raises No Important or Novel Issues.

Review by this Court on writ of certiorari is a matter of judicial discretion which will be granted only when there are special and important reasons for review. S. Ct. R. 10.1. One of the factors considered by this Court is whether the issues presented are novel and important. *See, e.g., O'Brien v. Brown*, 409 U.S. 1, 92 S. Ct. 2718, 34 L.Ed.2d 1 (1972) ("The petition for certiorari presents novel questions of importance . . ."); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1960).

In its effort to obtain review by this Court, WSSC has attempted to characterize the issue of whether municipalities and sewer authorities can be held liable under CERCLA as one of national importance. WSSC asserts that the Court of Appeals' decision "raises the *spectra [sic]* of immense CERCLA liability for municipalities and local governments." *See* Petition at 8-9. The issues raised by WSSC in the instant case are not novel. Municipal liability under CERCLA exists in other forms, has been recognized repeatedly by

federal courts, and the decision of the Court of Appeals is not in conflict with those decisions. Since WSSC fails to raise novel and important issues in its petition, its claims are not cognizable, and review should be denied.

A. The Decisions Below Do Not Conflict With *Lincoln Properties v. Higgins.*

WSSC argues that the District Court's and the Court of Appeals' decisions in this matter have "generated considerable discussion," in part because the rulings assertedly conflict with *Lincoln Properties, Ltd. v. Higgins,* 823 F. Supp. 1528 (E.D. Cal. 1992). *See* Petition at 9. WSSC's claim ignores the analysis by the district court in *Lincoln Properties*. In that case, the sewer authority, San Joaquin County, was not held liable under CERCLA for releases of hazardous substances from its sewer system. However, the court did not reach this result simply because the County was a municipality. Rather, the *Lincoln Properties* court found that, under the facts of that case, the County was entitled to the benefit of CERCLA's "innocent third party" defense. But for this defense, the County would have been liable as the owner/operator of the leaking sewer line. *Id.* at 1544.

In *Lincoln Properties,* the County proved the elements of this CERCLA affirmative defense. The county successfully demonstrated that it exercised due care with respect to the hazardous substances in question and that it took precautions against foreseeable acts or omissions of the third party who placed them in the sewer. *Id.* at 1539-40. The court found that the releases were not foreseeable, that San Joaquin County did not engage in any conduct which would contribute to the release, that there was a county ordinance which completely prohibited the discharge of cleaning solvents into the sewer system, that the County

exercised due care by repairing cracks in the sewer lines when leaks were discovered, and that the sewer lines were built and maintained in accordance with industry standards.

In the present case, the District Court and the Court of Appeals rejected WSSC's effort to establish the innocent third party defense. Based on the findings of fact below, this case is clearly distinguishable from *Lincoln Properties* with respect to the municipality's exercise of due care. WSSC, unlike San Joaquin County, did not exercise due care with respect to the PCE introduced into the sewer system and did not take precautions against foreseeable acts or omissions of a third party. In 1979 WSSC was given notice of the danger to groundwater from leaky sewers. Furthermore, as far back as 1974, WSSC was aware that IFI disposed small amounts of chemicals into the sewer; WSSC's regulations allowed discharge of toxic organics in limited concentrations; and WSSC had knowledge of IFI's use of PCE. *See Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) *reprinted in* Petition at Appendix (App.) A at 32a. Although both the District Court and the Court of Appeals recognized that IFI did not report discharges of PCE, neither court found or suggested that IFI "lied" about its practice of disposing PCE down its laboratory sinks. *See* Petition at 7. On the contrary, the Court of Appeals concurred with the District Court that WSSC should have reasonably perceived some risk that potential groundwater contaminants such as PCE were being released into the sewer. *See Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) *reprinted in* Petition App. A at 32a[1].

---

[1] As framed by WSSC, this case supposedly presents the issue of whether a "victimized" property owner -- in this case WSSC -- on whose property another person -- IFI -- released hazardous substances should properly be liable for

Thus, there is no conflict between this case and *Lincoln Properties*. There, as here, the court recognized that municipalities are not different from other persons for purposes of CERCLA liability. Under that precedent, as under this one, municipalities are strictly liable for releases of hazardous substances from their underground pipes, but may under appropriate facts invoke the statute's "innocent third party" defense. WSSC's real difficulty is that it simply did not, on the evidence, qualify for this defense, and it now asks this Court to review the question of municipal liability as if this defense does not exist. This is not the sort of "novel question of importance" that warrants this Court's review.

---

subsequent migration of the hazardous substances onto the property of a third party -- Westfarm. *See* Petition at i. The District Court and the Court of Appeals did not find WSSC to be an unknowing victim. (Indeed, the jury found WSSC negligent in its construction and maintenance of the Tech Road sewer.) WSSC constructed the Tech Road sewer as a conveyance for wastewater, and wastewater moved through that conveyance with WSSC's full knowledge. WSSC knew that IFI was discharging hazardous substances into the sewer system. Prior to 1983, WSSC did not limit discharges of toxic organic chemicals into its sewer system, and after that date, WSSC merely limited the concentration -- not the total quantity -- of toxic organic chemicals which could be placed into the system. *Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 *reprinted in* Petition App. A at 7a. In light of these facts, the movement of wastewater containing hazardous substances through the Tech Road sewer line was intended and foreseeable. Even if this Court wished to review the question of whether the unknown migration of contaminants across a landowner's property is a proper basis for imposing CERCLA liability on a "victimized" party, this case does not present such facts.

B. Municipal Liability Under CERCLA Has Been Repeatedly Recognized.

This Court has previously decided that States are explicitly included within CERCLA's definition of "person." In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989), in which it was decided that a State could be sued in federal court for monetary damages associated with cleanup costs for coal tar deposits in a creek, this Court stated,

> [t]he express inclusion of States within the statute's definition of 'persons,' and the plain statement that States are to be considered 'owners or operators' in all but very narrow circumstances, together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA.

Id. at 8.

The definition of "person" in the statute, 42 U.S.C. § 9601(22), explicitly includes municipalities, states, and other political subdivisions. It is therefore clear that municipalities and other political subdivisions can also be held liable for CERCLA cleanup costs, whether as owners or operators of a facility from which hazardous substances are released to the environment or as persons who "arranged for disposal" of hazardous substances at that facility. *See* 42 U.S.C § 9607(a)(1-3).

In particular, several district courts and at least one court of appeals have imposed CERCLA liability on municipalities for releases of hazardous substances from municipal solid waste landfills. Noting that the definition of

"person" includes such entities, these courts have discerned no indication that such persons were not intended to be covered by CERCLA's liability provisions. These courts viewed the fact that CERCLA includes limited exceptions to potential municipal liability as evidence of Congress' intent to otherwise subject municipalities to CERCLA liability. *See, e.g., B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1198-99 (2d Cir. 1992); *Transportation Leasing Co. v. The State of California*, 861 F. Supp 931 (C.D. Cal. 1993); *State of New Jersey v. Gloucester Env. Mgt. Serv.*, 821 F. Supp. 999, 1004-05 (D. N.J. 1993) ("If Congress had the ability to make explicit exemptions from liability in these sections, it had the ability to make exemptions in 42 U.S.C. § 9607(a)."); *Rhodes v. County of Darlington, S. Carolina*, 833 F. Supp. 1163, 1176 (D. S.C. 1992) (holding that the county as the owner-operator of a landfill was a "covered person" within the meaning of CERCLA).

The liability which WSSC now seeks to avoid is neither different from nor more significant than the liability imposed on municipalities under CERCLA as owners and operators of solid waste landfills from which hazardous substances sent by other persons have leaked into the environment. In both situations, the municipality accepts waste from the public, whether in the form of garbage or sewage. If the municipality has failed to contain the hazardous constituents which are present in such wastes, and hazardous substances escape from either type of facility, the municipality is strictly liable for resulting response costs.

There is simply no meaningful distinction between municipalities' liability under CERCLA for contamination emanating from publicly-owned landfills and that emanating from publicly-owned sewers. The present case presents no novel and important question of CERCLA jurisprudence; it

is simply a garden-variety case arising under well-settled principles of municipal liability.

C. Municipalities Have No Special Status Under CERCLA.

In support of its argument that the prior decisions in this case would unfairly "saddle" municipalities and sewer authorities with liability under CERCLA, WSSC asserts that such liability " . . . violates the fundamental principle underlying CERCLA by impermissibly shifting the burden of remediating releases of hazardous substance directly to the taxpayer." *See* Petition at 10, quoting Robert M. Frye, Note, *Municipal Sewer Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute,* 14 Stan. Envtl. L.J. 61, 95-96 (Jan. 1995).[2]

The federal courts have already addressed and rejected the theory that municipalities and their taxpayers should be accorded a special favored status in connection with liability for solid waste disposal. In *B.F. Goodrich v.*

[2] WSSC omits to note that a municipality may be able to shift part or all of its CERCLA liability to other responsible parties. Persons, who "arranged" for the placement of wastes containing hazardous substances in a municipal landfill or a municipal sewer, *e.g.*, industrial generators of solid waste, are jointly and severally liable with the facility owner or operator. *See* 42 U.S.C. § 107. These "arrangers" may be required to contribute all or part of the costs of remediation of leaks from the municipal facility in a contribution action under CERCLA. 42 U.S.C § 113(j). By way of illustration, in the instant case, IFI itself was held jointly and severally liable with WSSC for Westfarm's costs of environmental remediation.

Murtha, 958 F.2d 1192, several Connecticut towns and cities sought to escape liability for cleanup costs at a landfill to which they had shipped garbage, arguing that their taxpayers should be spared this financial burden. The Second Circuit affirmed the municipalities' liability, stating:

> [w]e agree that this [taxpayers in these jurisdictions shouldering the costs of cleanup] will inevitably be the result, but are unable to agree that it is adverse to Congress' aim. To the contrary, a narrow interpretation of CERCLA that exempts municipalities arranging for the disposal of municipal solid waste from liability increases the probability that cleanup costs will never be recovered, and will be paid instead from the Superfund funded in part by the taxpayers at large.

Id. at 1204.

The Court acknowledged that such a holding would have ". . . far reaching implications for municipalities and their taxpayers . . .," but noted that ". . . burdensome consequences are not sufficient grounds to judicially graft an exemption onto a statute, a graft that would thwart the language, purpose, and agency interpretation of the statute." *Id.* at 1206.

Furthermore, the liability about which WSSC complains is directly analogous to that faced by non-governmental persons under CERCLA. It may be true that, as WSSC notes, CERCLA's liability system may impose large cleanup costs on municipalities for releases both from landfills and from sewer systems. It may also be true that many public bodies may have historically found it impracticable to prevent the introduction of hazardous

substances into their landfills and sewer systems. These facts do not set municipalities apart from individuals and companies with respect to CERCLA's financial impacts. Both public and private sector entities have faced, and will continue to face, huge liabilities for cleanups under CERCLA, often for releases of hazardous substances that were unforeseen and uncontrollable under former waste management techniques. CERCLA's liability system is neither more unfair nor more burdensome to municipalities than it is to the thousands of businesses, large and small, that have routinely been held strictly liable for cleanup costs during the statute's fifteen year existence.

Again, then, WSSC's effort to have this Court consider carving out a taxpayer-protection exemption under CERCLA presents no novel and important question of law appropriate for review by this Court. Rather, it presents a fundamental question of public policy that Congress has long since decided.

II. There is No Disagreement Among Courts of Appeals Regarding WSSC's "Single" Release Theory.

Pursuant to Supreme Court Rule 10, this Court will generally grant review on writ of certiorari when a court of appeals has rendered a decision in conflict with the decision of another court of appeals. S. Ct. R. 10.1(a). As previously stated by this Court , "[a] principal purpose for which we use our certiorari jurisdiction, . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 348 , 111 S. Ct. 1854, 114 L.Ed.2d 385 (1991).

In an effort to obtain review by this Court, WSSC misstates the facts and obscures relevant precedents when it asserts that there is a split of authority concerning whether a "release" under CERCLA can occur only once and whether a person through whose property a hazardous substance subsequently migrates can be held liable as the owner of a facility from which there is a release.[3] WSSC cites three decisions as standing for the proposition that CERCLA's definition of "release" should be broadly interpreted to include "passive" migration of hazardous substances on or across a parcel of property. *See* Petition at 14-15 *(citing Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992), *cert. denied*, 121 L.Ed.2d 288; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988)). WSSC cites only district court decisions as holding that CERCLA owner/operator liability is only attributable to the person who owns the property where a hazardous substance is released, and not to a person who owns separate property onto which the substances passively migrate. *See* Petition at 12-14 *(citing Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg. Ltd.*, No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989); *United States v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1350-51 (N.D. Ill. 1992); *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 988-89 (E.D. Mich. 1991); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1456-58 (N.D. Cal. 1989); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 21 Env't. Rep.

[3] 42 U.S.C. §9601(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying , discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."

Cas. 1108, 1113 (BNA 1984), *rev'd in part on other grounds*, 840 F.2d 691 (9th Cir. 1988). Thus, at the outset, in the absence of any court of appeals decision contrary to *Nurad*, *Dedham Water*, or *Tanglewood East Homeowners*, *supra*, WSSC has failed to demonstrate a conflict between circuits that would justify this Court's review.

A. WSSC Cites No Applicable Support For Its "Single Release" Theory.

The district court cases cited by WSSC in support of its single release theory do not even stand for that proposition. All the decisions on which WSSC relies have concluded that the passive migration of a hazardous substance through the environment does not constitute "disposal" for purposes of imposing liability on a *former* owner/operator. *See United States v. Petersen Sand and Gravel, Inc., supra; Snediker Developers Ltd. Partnership v. Evans, supra; Ecodyne Corp. v. Shah, supra; Cadillac Fairview/California, Inc. v. Dow Chem. Co., supra.* [4] To

[4] Owner/operator liability takes two forms: current and historic. With respect to current owner/operators, § 9607(a)(1) provides,

> . . .t he owner and operator of a . . . facility. . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable [for response costs].

42 U.S.C. § 9607(a)(1).

With respect to past owner/operators, section 9607(a)(2) provides:

> . . . any person who *at the time of disposal of*

impose liability on a person who currently owns a facility where hazardous substances are released, it is enough to show that a hazardous substance has been released at or from that facility. In order to impose liability on a person who formerly owned a facility, it must additionally be shown that the person owned the facility at the time of "disposal" of a hazardous substance there.

The district courts in the cases on which WSSC relies uniformly concluded that "disposal" required active conduct, and, therefore, passive migration does not bring past owner/operators within the liability provision of § 9607(a)(2). The instant case, however, only involves the meaning and scope of "release" under CERCLA, not "disposal," thereby changing the focus of the analysis. The cases cited by WSSC did not reach the question whether a "release" includes passive migration. Indeed, in *Petersen Sand and Gravel*, 806 F. Supp. 1346, the district court, stated, ". . . it is undisputed that a 'release' includes the kind of passive migration at issue here." *Id.* at 1351. Thus, these cases are not applicable in the context of § 9607(a)(1) and do not pose an important question requiring review by this Court.[5]

> *any hazardous substance* owned or operated any facility at which such hazardous substances were disposed of, . . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable [for response costs].

42 U.S.C. § 9607(a)(2) (emphasis added).

[5] In addition to these cases, WSSC places heavy reliance on two entirely inapposite cases. In *Brookfield-North Riverside Water Comm'n v. Martin Oil*

Mktg. Ltd., No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992), plaintiff sued Martin Oil to recover the cost of replacing a water supply line into which contaminants migrated after being released from Martin Oil's underground tanks. Martin Oil asserted a third party claim against Abbott, the company that constructed and installed the water main, on the theory that Abbott was an owner or operator of the water line while constructing it. The court dismissed the third-party claim on the grounds that the only release of the chemicals occurred when they escaped from Martin Oil's tanks into the surrounding soils and that, in any event, Abbott had never owned or operated the water line. Significantly, however, in *Martin Oil* there was no contention that the substances in question were ever subsequently released from the water pipe. Rather, the water pipe itself, not the environment outside that pipe, was the ultimate destination of the chemicals. Thus, *Martin Oil* did not really present facts that required the Court to decide whether there can be sequential "releases" of hazardous substance under CERCLA.

In *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989), the court actually assumed the possibility of sequential releases under CERCLA, stating:

> Migration of hazardous chemicals by drainage to publicly owned sewers from home plumbing systems, and the seepage and leaching from domestic septic systems that *continues from earlier discharges*, constitute "releases(s)" within the definition stated in section 9601(22).

684 F. Supp. at 832-33 (emphasis added).

B. If There Was Only One "Release," It Was From WSSC's Sewer.

WSSC asserts that the leaking of PCE from the Tech Road sewer line should not be considered a "release" under CERCLA because the PCE was already "released" by IFI's disposal of PCE-contaminated wastewater into the laboratory drains. This argument ignores the broad scope of the term "release" found in the statute. This provision defines "release" as "*any* spilling, leaking, . . . leaching . . . into the environment." 42 U.S.C. § 9601(22) (emphasis added). WSSC's position also fails to take into account the complete definition of "facility." This term is defined in CERCLA, insofar as is relevant here, as " . . (b) *any* site or area where a hazardous substance has been deposited, . . . or *otherwise come to be located*; . . ." 42 U.S.C. § 9601(9) (emphasis added).

WSSC's stance on this issue was reviewed, and rejected, by the court in *Lincoln Properties, Ltd. v. Higgins*, *supra*. *Lincoln Properties* involved a fact pattern similar to the instant case. In that case, a shopping center owner and former dry cleaner tenants at the site sought recovery under CERCLA from the county for cleanup costs of property contaminated by PCE. The court determined that the wells and sewer line owned by the county where there was contamination were "facilities" for purposes of CERCLA.

The court went on to decide the only issue presented on defendant Staco's motion for summary judgment, holding that Staco's release of mercury to its employees' clothing and persons, whence it subsequently entered sewer systems, was *also* a release. *Id.* at 833. *Accord Lincoln Properties, supra* ("[n]or is the 'one source' or 'passive owner exception' advocated by the County supported by the overall structure or purpose of CERCLA.") 823 F. Supp. at 1536.

Id. at 1535. It also rejected the county's claim that only one release occurred -- when the dry cleaners placed PCE into the sewer pipes. The court stated,

> [t]he statutory language does not suggest that the release of a substance occurs only once if the substance is migrating, or that liability is limited to the owner or operator that introduced the substance initially or was the source of the substance, or that a "passive" owner or operator is exempted from the Act.

Id.

Even if this argument had not been squarely rejected in *Lincoln Properties*, WSSC's argument would not be correct because it proves too much. Applying WSSC's single release theory, a "release into the environment" did not occur when IFI sent wastewater containing PCE down the laboratory drain. The term "environment" is defined in relevant part as ". . . any other surface water, ground water, . . . or subsurface strata . . ." 42 U.S.C. § 9601(8). Thus, if, as WSSC asserts, only one release is possible, the release did not occur until PCE leaked from the sewer pipes into the environment, *i.e.* the subsurface environment.

In support of its argument on this issue, WSSC urges this Court to view the sewer system as the "environment." Petition at 16. Ironically, WSSC's argument implies that its sewer was so leaky that putting wastewater into that system was tantamount to simply dumping it into a pit in the ground or down a well. However, viewing a sewer system as part of the environment ignores the fact that sewer lines are man-made structures intended to contain and convey wastewater. WSSC's Tech Road sewer may have been located in the subsurface strata of the environment, but clearly was never intended to be a part of that environment.

To the extent that WSSC insists on its one-release theory, this Court could only affirm the Court of Appeals. Thus, review is not warranted.

CONCLUSION

The petition for certiorari should be denied. The petition does not invoke any of the considerations generally considered by this Court in granting review of a decision of a court of appeals. WSSC does not present any novel or important issues which require discretionary review by this Court nor does the decision of the Court of Appeals conflict with a decision of another court of appeals.

Respectfully submitted,

Timothy A. Vanderver, Jr.
Counsel of Record
Duane A. Siler
Ruth L. Ramsey
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
202-457-6000
202-457-6315 (fax)

Attorneys for International
Fabricare Institute

January, 1996

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

(3)

No. 95-1007

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT WESTFARM'S BRIEF IN OPPOSITION

JEFFREY M. JOHNSON
Counsel of Record
WOODY N. PETERSON
JOHN AGAR
DICKSTEIN, SHAPIRO & MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700
Counsel for Respondent Westfarm Associates Limited Partnership

February 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23PP

QUESTIONS PRESENTED FOR REVIEW

1. After a toxic chemical is put into a sewer, does a subsequent leak of the chemical out of the sewer, caused by the sewer owner's negligence, constitute a "release" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")?

2. Does CERCLA render a sewer owner liable for toxic waste contamination resulting from the owner's negligence?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Westfarm Associates Limited Partnership states that it is not a corporation, and has no parent company or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	3
INTRODUCTION	3
1. WSSC Learns In 1974 That Toxic Chemicals Were Routinely Dumped In Its Sewer, But Does Nothing About It	4
2. WSSC's 1977 Inspection Of Its Sewer Reveals The Need For Repairs; WSSC Again Takes No Action	5
3. Toxic Chemicals Leaking Out Of WSSC's Sewer Contaminate Westfarm's Land; The District Court And The Jury Award Westfarm Damages Caused By WSSC's Negligence	5
4. The Court Of Appeals Affirms The Summary Judgment And Verdict	6
REASONS WHY THE PETITION SHOULD BE DENIED	8
I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS	8
II. THIS CASE DOES NOT PRESENT ANY QUESTION OF "NATIONAL IMPORTANCE"; EVEN IF IT DID, THAT QUESTION IS FOR CONGRESS TO ANSWER	11
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) .. 10
B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) 11, 13, 16
Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd., No. 90 C 5884, 1992 WL 63274 (N.D. Ill. Mar. 12, 1992) 9
Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) 8
Diamond v. Chakrabarty, 447 U.S. 303 (1980) 16
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 8
Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992) 8, 9, 13, 14, 15
NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) .. 8
Neal v. United States, 64 U.S.L.W. 4077 (U.S. Jan. 22, 1996) 16
New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) 8, 11
Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992) 8
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) .. 16
Powell v. Nevada, 114 S. Ct. 1280 (1994) 10
Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) 8
United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) 7
Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989) 9, 10

Statutes and Regulations:

42 U.S.C. §§ 9601, *et seq.* 4
42 U.S.C. § 9601(8) 1, 9, 10
42 U.S.C. § 9601(9) 1, 10
42 U.S.C. § 9601(20)(D) 2
42 U.S.C. § 9601(21) 1
42 U.S.C. § 9601(22) 1

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 9607(a) 1
42 U.S.C. § 9607(b)(3) 2, 6, 12
42 U.S.C. § 9613(f)(1) 3, 13
40 C.F.R. § 302.4 4

Supreme Court Rules:

Rule 10 9
Rule 14.1(a) 10

Legislative Material:

H.R. 854, 104th Cong., 1st Sess. (1995) 17
H.R. 855, 104th Cong., 1st Sess. (1995) 17

Miscellaneous:

Robert M. Frye, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable for Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute*, 14 Stan. Envtl. L.J. 61 (1995) 14

Peter R. Hinckley, *State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay for the Cleanup of Hazardous Industrial and Commercial Sewer Discharges?*, 22 B.C. Envtl. Aff. L. Rev. 89 (1994) 14, 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1007

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT WESTFARM'S BRIEF IN OPPOSITION

STATUTES INVOLVED

The CERCLA definitions of "environment" (42 U.S.C. § 9601(8)); "facility" (42 U.S.C. § 9601(9)); and "release" (42 U.S.C. § 9601(22)), as well as the liability provision for an "owner" or "operator" of a "facility" (42 U.S.C. § 9607(a)), are set out at pp. 2-5 of the Petition.

The term "person" is defined by CERCLA (42 U.S.C. § 9601(21)) to mean:

> an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

Section 9601(20)(D), 42 U.S.C. § 9601(20)(D) further provides:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

CERCLA's "innocent landowner" affirmative defense appears at 42 U.S.C. § 9607(b)(3), which states in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> * * * *
>
> (3) an act or omission of a third party * * * if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions * * *.

Finally, 42 U.S.C. § 9613(f)(1) provides in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. * * * In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. * * *

COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Petitioner Washington Suburban Sanitary Commission ("WSSC") operates a sewer system. (Pet. 2a.)[1] WSSC's sewer line runs adjacent to property owned by Respondent Westfarm Associates Limited Partnership ("Westfarm"), and serves a research laboratory operated by Westfarm's neighbor, Respondent International Fabricare Institute ("IFI"). (*Id.* at 2a-4a.) IFI poured toxic chemicals down a laboratory drain which subsequently leaked out of WSSC's sewer and contaminated Westfarm's land. (*Id.* at 3a-4a.)

WSSC does not seek review of the Fourth Circuit's ultimate conclusion that but for WSSC's negligence, Westfarm's land would never have been contaminated by chemicals leaking out of WSSC's sewer. (Pet. 36a.) Nor does WSSC challenge the court of appeals' findings on which that conclusion rested:

(a) WSSC negligently maintained its sewer,

(b) WSSC's negligence caused toxic chemicals to leak out of its unrepaired sewer and caused contamination of Westfarm's property, and

---

[1] "Pet." references are to the Petition for a Writ of Certiorari in this case.

(c) WSSC had no affirmative defense to liability under CERCLA because it failed to prove it exercised due care in maintaining its sewer.

(*Id.* at 20a-24a, 36a.)

In its Petition, WSSC glosses over its now conceded negligence, even though it is central—and fatal—to its claims here that it has no liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), as amended, 42 U.S.C. §§ 9601, *et seq.* We are therefore compelled to set out briefly below the undisputed record evidence of negligence relied on by the Fourth Circuit which WSSC would have this Court ignore.

1. WSSC Learns In 1974 That Toxic Chemicals Were Routinely Dumped In Its Sewer, But Does Nothing About It

From 1974 to 1992, IFI's laboratory next to Westfarm's property annually analyzed hundreds of samples of PCE,[2] a toxic solvent listed as a hazardous substance under CERCLA (40 C.F.R. § 302.4). (Pet. 3a.) Every year during this period, IFI poured at least three gallons of PCE down a sink drain into the connected sewer line. (*Id.*) Although WSSC knew as early as June 1974 that IFI was routinely disposing of small amounts of toxic chemicals into the sewer system, WSSC took no steps to prevent further dumping. (*Id.* at 7a, 23a-24a.)[3]

---

[2] "PCE" stands for perchloroethylene, a substance also known as tetrochloroethylene. (Pet. 2a.)

[3] WSSC says that IFI "lied" to WSSC about the disposal of PCE into the sewer. (Pet. 7.) WSSC so argued below, but the jury and the court of appeals, in determinations WSSC does not contest here, concluded otherwise when they found WSSC liable for its own negligence.

2. WSSC's 1977 Inspection Of Its Sewer Reveals The Need For Repairs; WSSC Again Takes No Action

The PCE that IFI poured down the drain entered a sewer lateral connecting IFI's laboratory with WSSC's main sewer line (the "Tech Road sewer"), which runs beside Westfarm's property. (Pet. 3a-4a.) In 1977, WSSC surveyed the Tech Road sewer segment closest to IFI, and found that ten internal grouting repairs were needed. (*Id.* at 5a-6a.) There is no evidence that the repairs were ever made. (*Id.* at 6a.)

In 1993, a video camera inspection of WSSC's Tech Road sewer was conducted,

> revealing numerous flaws along the length of the line, including open joints, improper alignment resulting in sags in the line and offset joints, cracks, broken pipes, improperly installed gaskets and improper manhole construction.

(Pet. 5a.)

3. Toxic Chemicals Leaking Out Of WSSC's Sewer Contaminate Westfarm's Land; The District Court And The Jury Award Westfarm Damages Caused By WSSC's Negligence

The foregoing facts surfaced after a prospective buyer of the Westfarm parcel terminated the purchase contract when an environmental audit revealed the presence of PCE in the ground water beneath the property. (Pet. 3a.)[4] Westfarm thereafter sued WSSC under CERCLA to re-

---

[4] The water and sediment samples taken within the Tech Road sewer contained "elevated levels of PCE, including the highest level found in any sample at the site—110,000 parts per billion (ppb) PCE in the sediment at WSSC's manhole." (Pet. 5a.) By way of comparison, "the maximum contaminant level for PCE in drinking water, as established by the Environmental Protection Agency, is 5 ppb." (*Id.* at 5a n.2.) The PCE concentration in the ground water beneath IFI's and Westfarm's properties "ranged from several hundred ppb to approximately 7000 ppb." (*Id.*)

cover the cleanup costs, and under Maryland common law to recoup the economic losses, occasioned by WSSC's negligence. (*Id.* at 2a.) Westfarm successfully moved for summary judgment on its CERCLA claims, and the district court awarded it $140,930 in recoverable cleanup costs. (*Id.* at 8a-9a.) Westfarm also won a $2.5 million jury verdict on its common law claims for WSSC's negligent construction, maintenance and operation of its sewer. (*Id.* at 8a-9a, 32a.)[5]

4. The Court Of Appeals Affirms The Summary Judgment And Verdict

WSSC appealed the verdict and summary judgment to the Fourth Circuit "on a variety of grounds, including, most prominently, public policy arguments for exempting sewer operators from liability for damage caused by wastes dumped in the sewers by third parties." (Pet. 2a-3a.) The court of appeals affirmed in all respects. (*Id.* at 3a.) The court first found that under CERCLA, WSSC was an "owner" or "operator" of a "facility" (its sewer pipes), that PCE leakage out of that facility was a CERCLA "release," and that the leak caused contamination of Westfarm's land. (*Id.* at 13a-17a, 20a, 22a.)

The Fourth Circuit then rejected WSSC's claim that summary judgment should not have been entered against it because WSSC had a viable CERCLA "innocent landowner" affirmative defense. (Pet. 22a-24a.)[6] That sum-

---

[5] IFI was a co-defendant of WSSC in this action, and had the same summary judgment and verdict entered against it. IFI has filed a brief in opposition to the petition for certiorari.

[6] CERCLA contains an "innocent landowner" or "third party" affirmative defense. *See* 42 U.S.C. § 9607(b)(3); *see also* Pet. 22a-23a. The "due care" element of this defense requires the defendant to prove that it "exercised due care with respect to the hazardous substance concerned," and "took precautions against foreseeable acts or omissions of any * * * third party." *Id.*

mary judgment rested on the following "undisputed evidence":

> WSSC knew from inspecting IFI's facility that IFI used PCE and knew that IFI poured hazardous substances into the sewer. In fact, WSSC regulations permitted discharges of certain quantities of toxic organics and other hazardous substances. WSSC was also aware that cracks were present in its sewer. Yet WSSC took no precautions—such as mending the pipes or banning the discharge of toxic organics—against the foreseeable result that hazardous substances such as PCE would be discharged into the sewer.

(*Id.* at 23a-24a.) Accordingly, WSSC could not escape summary judgment by relying on CERCLA's "innocent landowner" defense to liability, as "CERCLA does not sanction 'willful or negligent blindness.'" (*Id.*, quoting *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).) WSSC "had the power to abate the foreseeable release of PCE, yet failed to exercise that power." (Pet. 24a.) In light of that failure, the Fourth Circuit could not

> find that any genuine dispute was created that WSSC exercised due care or took precautions against the foreseeable acts of third parties such as would have entitled it to the "innocent landowner" defense.

(*Id.*) And, as regards the jury verdict, "sufficient evidence existed for a reasonable jury to determine, as it did, that WSSC's negligence was a proximate cause of Westfarm's injury." (*Id.* at 36a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

WSSC says that a "split of authority" exists as to whether CERCLA liability should be limited to the initial "releasor" of the hazardous substance (here, IFI, which put the PCE into WSSC's sewer), or also include those whose negligence allows the toxic substance subsequently to leak into the groundwater (here, WSSC, whose failure to repair its sewer caused PCE to contaminate Westfarm's land). (Pet. 12-14.) No such conflict exists. As the Fourth Circuit emphasized, all circuit courts which "have considered the question agree that CERCLA imposes liability for multiple releases." (*Id.* at 19a, citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 (1st Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)); *see also Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1536-39 (E.D. Cal. 1992).

WSSC argues that each of these appellate decisions is "factually distinguishable" from the present case. (Pet. 15.) Two points are in order. First, WSSC's "factual distinctions" do not advance its argument, if only because this Court does not sit to resolve conflicts among the courts of appeals created solely by differing fact patterns. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). Second, as regards the legal issue of "multiple releases" WSSC says its Petition presents, the courts of appeals have all rejected the argument

WSSC makes here. WSSC itself concedes as much. (Pet. 14-15.)[7]

Unable to base its Petition on an intercircuit conflict, WSSC is reduced to claiming that allegedly inconsistent district court decisions warrant issuance of the Writ. (Pet. 12-14.) We show in Part II below that *Lincoln Properties*, the only case WSSC cites (Pet. 9) as directly "conflicting" with the courts of appeals' uniform "multiple release" analysis, in fact adopts it. For present purposes, it is sufficient to note that even the purported district court inconsistently does not exist,[8] and if it did, it would afford no basis for granting the Petition. *See* Rule 10 of this Court.

In the penultimate paragraph of its Petition (at 16), WSSC absurdly suggests that a concrete sewer pipe falls under CERCLA's definition of "environment," as "surface water, ground water * * * or subsurface strata," 42 U.S.C. § 9601(8), because ground water can naturally seep *into*

---

[7] In any event, as the Fourth Circuit recognized, the unanimous holdings of these courts of appeals that CERCLA imposes liability for multiple releases did not rest on the purported "fact differences" WSSC recites. *See* Pet. 18a-19a. If anything, these differing fact patterns only serve to confirm the sweep, across a range of facts, of the uniform legal principle for which these cases stand.

[8] Thus, *Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.*, No. 90 C 5884, 1992 WL 63274 (N.D. Ill. Mar. 12, 1992), did not address whether a leak *from* a pipe (like the PCE leak from WSSC's sewer) was a "release," but only whether a leak *into* a pipe was, and even then did so in dicta. *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989), is likewise unavailing. *Staco* did not involve the question of whether only the first CERCLA "release" counts. Instead, the court simply held that it *did* count. It could hardly have done otherwise, as there was no claim against the owner of the pipes.

All of the remaining WSSC cases deal with an entirely different issue: whether persons owning property when a hazardous substance passively migrates onto it are liable under CERCLA, on the theory that such migration constitutes a "disposal" during their ownership. None of the cases considers—much less embraces—WSSC's novel "singe release" theory.

a sewer pipe. Therefore, says WSSC, the PCE leakage *out* of cracks in its pipe cannot be a CERCLA release "into" the environment, since the PCE was already "in" the environment, *i.e.*, its pipe . This contention can be disposed of in short order. WSSC did not tender this issue in its Questions Presented and did not present it below. WSSC nowhere explains why this Court should deviate from its traditional rule and reach the merits of an issue neither raised in a Question Presented (*see* this Court's Rule 14.1(a)), nor in the court of appeals. *Powell v. Nevada*, 114 S. Ct. 1280, 1284 n.* (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Beyond that, WSSC's argument is ludicrous. To read CERCLA as equating a concrete or cast iron sewer pipe with surface or ground "water," one must either not understand the English language, or ignore CERCLA's text and purpose. WSSC cites no authority for this remarkable proposition, because it cannot: no court has ever held that an owner of a CERCLA facility from which there was a release, caused by the owner's negligence, has no CERCLA liability.[9]

If accepted, WSSC's argument would mean that no owner of a "well, pit, pond, lagoon, impoundment, ditch, landfill," or other such CERCLA "facility" in the "environment" (*see* 42 U.S.C. §§ 9601(8), 9601(9)), who (like WSSC) negligently allowed hazardous substances to leak out of such "facilities" could ever be liable under CERCLA.[10] Such a reading is squarely at odds with the

---

[9] *Staco*, 684 F. Supp. 822, the only case WSSC does mention (Pet. 16), is inapposite. The opinion does not hold or suggest that a sewer pipe is part of the "environment," let alone that there cannot be a CERCLA "release" from such a pipe.

[10] WSSC argued below that its pipe was not a CERCLA "facility." Both the district court (Pet. 57a-58a) and the court of

text of the Act and its policies. *See Shore Realty*, 759 F.2d at 1045 (Act cannot be read so as to "open a huge loophole in CERCLA's coverage"); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1204 (2d Cir. 1992) (rejecting CERCLA construction that "would free a potentially responsible party from liability, in blatant contravention of the statute's goals"). Moreover, WSSC's interpretation would give sewer owners the very CERCLA immunity Congress denied them, both when it passed the statute in 1980, and when it subsequently refused so to amend the Act. *See infra* pp. 16-17 & n.16.

II. THIS CASE DOES NOT PRESENT ANY QUESTION OF "NATIONAL IMPORTANCE"; EVEN IF IT DID, THAT QUESTION IS FOR CONGRESS TO ANSWER

According to WSSC, the decision below is of "national importance" because, unless reversed, it will require "victimized" and "passive" sewer operators to maintain leakproof sewers, "entirely control" the actions of their customers, and "insure" that "all" hazardous waste remains within the pipe. (Pet. i, 8-11, 17.) There are two dispositive answers to WSSC's hysteria. First, as shown above, WSSC was neither a "victim" nor "passive," but a sewer operator which "*actively*"—through its conceded negligence—allowed the PCE to leak *out of* the unrepaired cracks it *knew* were in its sewer:

> Although once WSSC built its sewer system, it apparently did become quite "passive" in its actions regarding operation and maintenance of the sewer, this passivity was negligent in and of itself because WSSC knew that the sewer contained cracks and should have known that the sewer needed maintenance.

(*Id.* at 36a.)

---

appeals (*id.* at 13a-15a) rejected this contention. WSSC wisely does not resurrect it in this Court.

Second, the Fourth Circuit decision does not set an impossible standard for sewer operators to meet. Rather, all the court of appeals requires of sewer operators is that they satisfy the elements of CERCLA's innocent landowner defense (42 U.S.C. § 9607(b)(3)), by exercising "due care" in maintaining their systems, and taking reasonable "precautions against foreseeable acts" of their customers. (Pet. 23a-24a.) A sewer operator not guilty of negligence has nothing to fear from the Fourth Circuit's opinion:

> WSSC argues that because Westfarm admitted that all sewers leak—because water can pass through a solid wall of concrete to a small extent—all sewer operators will be held liable. *The duty to exercise reasonable care, however, does not require a leak-proof sewer system, only a sewer which does not leak unreasonably due to being constructed, maintained, and operated without due care.* Moreover, the scope of the duty reasonably to prevent leaks will vary with the reasonable expectation of what materials foreseeably might find their way into the sewer; the reasonable construction, maintenance, and repair of a sewer carrying only "toilet, sink, shower and bath" household waste might differ from the reasonable construction, maintenance, and repair of a sewer carrying dangerous industrial chemicals.

(*Id.* at 33a-34a (emphasis added).) Accordingly,

> WSSC's policy argument that CERCLA liability in the instant case will force sewer operators to fear liability from "every toilet, sink, shower and bath," falls flat. If domestic users of sewers do not foreseeably release hazardous materials into the sewer system, the [CERCLA] third party defense will allow WSSC to avoid liability for an unforeseeable dumping of hazardous substances into domestic plumbing.

(*Id.* at 24a.)[11]

---

[11] WSSC's argument also overlooks the fact that even if sewer operators are found liable under CERCLA, the Act allows them

If any further proof were needed that a sewer operator, who—unlike WSSC—acts with reasonable care, has no exposure under CERCLA, *Lincoln Properties*, the very case WSSC relies upon (Pet. 9), provides it. In *Lincoln Properties*, the county sewer authority exercised due care in maintaining its sewer and took reasonable precautions against its customers' foreseeable toxic discharges. 823 F. Supp. at 1543-44. Because the sewer authority "established by uncontroverted evidence" all elements of the innocent landowner defense, it had no CERCLA liability for the PCE contamination. *Id.* at 1544.[12] Therefore, only those operators like WSSC, who concededly fail to exercise ordinary care in maintaining their sewers, are subject to CERCLA liability under the court of appeals' rationale, just as public sewer operators have been traditionally liable for such negligence at common law. *See* Pet. 26a-27a (collecting Maryland cases).[13]

Given the black letter negligence principles (rooted in the common law and embodied in CERCLA's innocent landowner defense) on which the decision below turns, it is no wonder that the "considerable discussion" in the

---

to petition the court to apportion the cleanup costs to reflect the defendants' relative responsibility for the contamination. *See* 42 U.S.C. § 9613(f)(1).

[12] The *Lincoln Properties* court so held, even though there was substantial PCE contamination, which the court assumed for purposes of its decision resulted from leaks in the sewer authority's wells and pipes. *Id.* at 1533, 1538-39. So much for WSSC's melodramatic claim (Pet. 8-9) that under the court of appeals' decision here, a non-negligent sewer operator would be responsible under CERCLA for cleanup costs if it did not "insure" that "all" hazardous waste remained within the pipe, but instead allowed "a single molecule" of waste to escape.

[13] Of course, even if the duties to exercise due care and avoid negligent maintenance of a sewer could properly be characterized as "burdens" (Pet. 8-9), such "burdensome consequences are not sufficient grounds to judicially graft an exemption onto a statute, a graft that would thwart the language, purpose, and agency interpretation" of CERCLA. *B.F. Goodrich*, 958 F.2d at 1206.

"environmental arena" (Pet. 9) WSSC says has been generated by this case consists only of two law review Notes.[14] One of these Notes claims that the decision in this case conflicts with the district court decision in *Lincoln Properties*, 823 F. Supp. 1528. Frye, *supra* note 14. This contention is specious. *Lincoln Properties* rejected the "single release" theory WSSC advocates, in favor of the "multiple release" analysis followed by all the courts of appeals. 823 F. Supp. at 1536-37. Indeed, the Fourth Circuit cited *Lincoln Properties* for this very reason. *See* Pet. 19a. The sewer authority prevailed in *Lincoln Properties*, not on the basis of a "single release" argument, but because on the facts there presented, the sewer authority was entitled to rely on CERCLA's innocent landowner defense. 823 F. Supp. at 1543-44.

As the better-reasoned of these two law student analyses points out, *Lincoln Properties* and *Westfarm* both applied the same legal analysis of public sewer system liability under CERCLA to dramatically different facts. 22 B.C. Envtl. Aff. L. Rev. at 115, 127. Thus, *Westfarm* "is an example of an instance in which a public sewer system authority failed to take the ordinary steps necessary to defend itself against CERCLA liability." *Id.* at 127. Specifically, WSSC

> designed its sewer system to leak and failed to upkeep its sewer lines properly even when it was on notice that portions of its sewer line needed repair. Although the WSSC possessed an ordinance that regulated discharges into the sewer system, the court found that the ordinance provided insufficient protec-

---

[14] Peter R. Hinckley, *State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay for the Cleanup of Hazardous Industrial and Commercial Sewer Discharges?*, 22 B.C. Envtl. Aff. L. Rev. 89 (1994); Robert M. Frye, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable for Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute*, 14 Stan. Envtl. L.J. 61 (1995).

> tion against hazardous discharges. Finally, a WSSC representative admitted that the WSSC foresaw that some of its industrial customers would release hazardous substances into the sewer system. * * * Because the WSSC's conduct proximately caused the PCE contamination, the WSSC failed to satisfy the "caused solely by" requirement of CERCLA's third party affirmative defense.

Id. at 116 (footnotes omitted). In *Lincoln Properties,* on the other hand, the County

> *exercised due care and took reasonable precautions against the foreseeable acts and omissions of its commercial customers.* The County built and maintained sewer lines in accordance with industry standards and promulgated an ordinance that prohibited the discharge of PCE and other cleaning solvents into the sewer system. The County also could not be expected to foresee that its ordinance prohibiting the discharge of hazardous substances would be violated. Under such circumstances, the County's conduct was indirect and insubstantial to the release of PCE and the County thus met the "caused solely by" third parties requirement.

Id. at 115-16 (emphasis added) (footnotes omitted).

In sum, WSSC's "questions" of "national importance" are not raised by the decision below, and have not triggered a conflict among the circuits, or even resulted in inconsistency in the district courts. That is not surprising, as WSSC's true quarrel is with CERCLA and the Congressional purposes it furthers. WSSC does not want to be covered by CERCLA, nor to have to act with the reasonable care the Act requires of sewer operators. Unfortunately for WSSC, CERCLA on its face applies to public sewer operators like WSSC, and subjects them to the same strict liability, tempered by the innocent landowner defense, imposed on all "operators" of "facilities."

When the Fourth Circuit found WSSC liable for CERCLA cleanup costs caused by its negligence, it simply

obeyed the plain command of the Act, and thereby advanced CERCLA's overriding goal of "impos[ing] the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).[15] WSSC's "failure to maintain its pipes in good condition earned it some responsibility for the contamination." (Pet. 19a.) Treating PCE leaking out of WSSC's negligently maintained sewers as a "release" therefore does no violence to CERCLA's policy; instead, it vindicates it. (*Id.* at 19a-20a.)

As the Fourth Circuit held, in the final analysis the ultimate question WSSC raises—whether leaks caused by public sewer operators' negligence are covered by CERCLA—is "for the Congress * * * to decide." (Pet. 41a.) Indeed, the question has already been answered by the legislative branch:

> We sit as a court, not a super-legislature. While the public policy arguments raised by WSSC may be meritorious, we can only presume that those arguments were weighed and rejected by Congress when it enacted CERCLA without including a broad exemption for state and local governments or their [publicly owned treatment works].

(*Id.* at 17a.) *See Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) ("Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."); *see also Neal v. United States*, 64 U.S.L.W. 4077, 4080 (U.S. Jan. 22, 1996). This Court's observation in *Diamond* applies with particular force here, in light of Congress' post-enactment refusal to pass legislation containing the very protections WSSC asks this Court to read into the statute. *See* 22 B.C. Envtl. Aff. L. Rev. at 102-04, 126 (summarizing

---

[15] Subsidiary CERCLA policy considerations likewise support the result reached below. *See* Pet. 16a-17a; *B.F. Goodrich*, 958 F.2d at 1204; 22 B.C. Envtl. Aff. L. Rev. at 121-22.

unsuccessful attempts in 1991 and 1993 to amend the Act so as to exempt public sewer systems from CERCLA liability).[16]

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

JEFFREY M. JOHNSON
Counsel of Record
WOODY N. PETERSON
JOHN AGAR
DICKSTEIN, SHAPIRO &
MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700
Counsel for Respondent
Westfarm Associates
Limited Partnership

February 1996

---

[16] Similar efforts in 1995 met the same fate. *See* H.R. 854, 104th Cong., 1st Sess. (1995) (bill to eliminate sewer owner CERCLA liability for transportation of municipal solid waste); H.R. 855, 104th Cong., 1st Sess. (1995) (proposed amendment of CERCLA to cap liability for cleanup of municipal solid waste).